IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

THOMAS R. MARSHALL, as Governor of the State of Indiana, et al.,
Plaintiffs in Error,
v.
JOHN T. DYE,
Defendant in Error.

No. 401.
In Error to the Supreme Court of Indiana.

MOTION TO ADVANCE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

THOMAS R. MARSHALL, as Governor of the State of Indiana, Et Al., *Plaintiffs in Error*, v. JOHN T. DYE, *Defendant in Error.*	No. 890. In Error to the Supreme Court of Indiana.

MOTION TO ADVANCE.

The General Assembly of Indiana at its 1911 session promulgated a form for a new constitution for said State, and provided for the submission thereof to the voters of the State at the general election for adoption or rejection.

The election law of said State, long in force and of unquestioned validity, provides that:

"Whenever any constitutional amendment *or other question is required by law* to be submitted to the popular vote, if all the electors of the State are entitled to vote on such question, the State Board of Election Commissioners shall cause a brief statement of the same to be printed on the State ballots and the words 'yes' and 'no' under the same, so that

the elector may indicate his preference by stamping at the place designated in front of either word."

§6944 Burns 1908.

The Constitution and the oath of the Governor require that "he shall take care that the laws be faithfully executed."

Art. 5, §16, Constitution of Indiana.

The statute also provides that:

"The Governor of the State and two qualified electors by him appointed, one from each of the two political parties that cast the largest number of votes in the State at the last preceding election, shall constitute a State board of election commissioners. Such appointment shall be made at least thirty days prior to each general election."

§6897 Burns 1908.

Article 3 of the Constitution of Indiana, adopted in 1851 and in force since said year, is as follows:

"The powers of the government are divided into three separate departments, the legislative, the executive, including the administrative, and the judicial; *and no person charged with official duties under one of these departments shall exercise any of the functions of another*, except as in this Constitution expressly provided."

The ~~plaintiff~~ defendant in error secured a judgment in the Circuit Court of Marion County, Indiana, enjoining the Governor of Indiana, and his co-plaintiffs in er-

ror, from performing the purely political duty of providing for the submission of the question required by the Legislature to be submitted to the people at the general election of 1912, namely: Whether said proposed new constitution should be adopted or rejected.

(1) The Supreme Court of Indiana on appeal held in effect that the courts have power to enjoin the Governor of the State from the performance of political duties imposed upon him by the General Assembly; (2) that the judicial department of the State is superior to both the executive and legislative departments thereof; (3) that the expediency of submitting political questions to the people for their approval is a matter for judicial and not for legislative determination; (4) that the people of said State cannot change, alter or reform their government without obtaining the permission of the judicial department to do so in advance, and (5) that the provision for amendment contained in the Constitution of 1851 was intended to be exclusive of other methods of constitutional change; that the power of the people to change, alter or reform their government is limited by such intention.

Thomas R. Marshall did not, as Governor of Indiana, do as he might have done—ignore the judgment of said Circuit Court and the mandate of said Supreme Court, but prosecutes this writ of error, averring that the said decree of said Supreme Court was a usurpation of power carried on under the form of a judicial proceeding which can only be adequately

dealt with by the judicial department of the national government in execution of the guaranty contained in Article 4, Section 4, of the Constitution of the United States.

In his message to the General Assembly at its 1913 session, Governor Marshall gave his reasons for obeying the mandate of the Supreme Court and for disobeying the mandate of the General Assembly of Indiana as follows:

"The last General Assembly recognizing our unfortunate condition with reference to the amendment of the State Constitution, ordered presented for adoption or rejection by the people at the election in 1912, a new constitution. An action was brought to enjoin and restrain the Governor and the other members of the State Board of Election Commissioners and the Secretary of State from putting the question of adoption or rejection upon the ballot. The litigation resulted in a permanent injunction by the Indiana Supreme Court upon a divided opinion, three members of the court being in favor of the injunction and two against it. In the majority opinion is found this language:

" 'There can be little doubt but that the framers of the revised constitution of 1851 believed that in Article XVI they had provided an orderly method for making all the changes in the organic law which might be necessary. * * * It is manifest that they held the views relating to future changes in the organic law which influenced the Convention of Massachusetts of 1820, of which Daniel Webster was

a member and chairman of the Committee on Future Amendments, which reported in favor of the legislative mode of proposing amendments under guards and restrictions and inserted no provision for calling a convention. In explaining the reason for the action, Mr. Webster said:

"'It occurred to the committee that with the experience which we had had of the constitution, there was little probability that after the amendments which should now be adopted, there would ever be occasion for great changes. No revision of its general principles would be necessary and the alterations which should be called for by a change of circumstances would be limited and specific. It was, therefore, the opinion of the committee that no provision for a revision of the whole constitution was expedient and the only question was in what manner it should be provided that particular amendments might be obtained. It was a natural course and conformable to analogy and precedent in some degree that every proposition for amendment should originate in the Legislature under certain guards and be sent out to the people.' (Deb., Mass. Con. 1820, pp. 413, 414.)

"'One thing is clearly disclosed by the review given by the proceedings of the convention on this subject and that is that it was the judgment of that body that an easy and wholly adequate method of making needed changes in the constitution had been provided. * * * It is the rule that where the means by which the power granted shall be exercised

or specified, no other or different means for the exercise of such power can be implied even though considered more convenient or effective than the means given in the constitution; and the constitution gives special power to the legislature and provides the means of exercising it to effect needed changes in the organic law.'

"This last paragraph applies the doctrine that the expression of one thing is the exclusion of every other thing to a constitutional provision, though to my mind, it has no application. The maxim applies to ordinary statutes as a rule of action given by a superior to an inferior. In a constitution, a State vests its sovereign powers in three departments and then imposes by express provisions such restrictions on the exercise of these powers as may be desired.

"With utmost respect for the majority of the Supreme Court, I felt that it had usurped the functions of the legislative and executive branches of government; that the sheriff of the court would have a rather interesting time in getting possession of my body and punishing me for contempt; and that such decisions gave greater impetus to the recall of judges and decisions than all the opinions of mere laymen touching the usurpations of the courts. Yet, I realized I might be wrong.

"Though believing that it was making of the Supreme Court the only branch of government which we had, still I felt that while there was a possiblity of a judicial review, I should not set myself up as a judge and resist by force of arms what to me was an

encroachment of the judiciary upon my constitutional rights. I was wholly unwilling to permit my personal views to result in anarchy. I believed that an orderly procedure with respect for the court, however little respect I might hold for its opinion, was the one for me to pursue. I felt assured that the Supreme Court of the United States would not punish me for trying to be a law-abiding citizen by refusing to decide the great questions involved in this controversy upon the theory that they were not judicial but political in their character.

"The question has now passed beyond the mere domain of party politics. The majority opinion leaves the State in doubt as to whether it can even call a constitutional convention, and as to whether our fathers did not foreclose upon posterity its right to alter and reform its system of government. It also leaves involved a far greater determination—that of the right of the court to strip the Legislature and Executive of their constitutional rights and to set itself up, not as a coördinate, but as a supreme, branch of government.

In accordance with these views, I have sued out a writ of error to the Supreme Court of the United States with confidence that that court will assume jurisdiction and decide the questions involved and with confidence that it will not dismiss the case and tell me that if I thought I was right, I should have totally disregarded the decision of the Supreme Court, defied its authority, thrown its sheriff out of my window, called out the militia to defend my po-

sition and submitted the question to the people regardless of the court."

It is important that the decision of the questions herein involved by this court be made at the earliest practicable time, for the reason that two of the leading political parties of said State have in convention declared for a new constitution, and the third of said leading parties has, as hereinbefore set out, attempted to secure the adoption of one; that the General Assembly and executive branches of said government are unable to exercise the powers delegated to them without creating an unseemly contest of authority and an appearance of anarchy; that the people themselves are prevented from peaceably and quietly exercising their inalienable right to change, alter and reform their government.

Wherefore, plaintiffs in error ask that the cause be set down for hearing at a convenient and early day.

Notice of this motion has been served upon counsel for the defendants in error.

THOS. M. HONAN,
Attorney-General for Indiana.

DAN W. SIMMS,
WARD H. WATSON,
Attorneys for Plaintiffs in Error.

March 24, 1913.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

THOMAS E. MARSHALL, as Governor of the State of Indiana, et al.,
Plaintiffs in Error,
v.
JOHN T. DYE,
Defendant in Error.

No. 401
(28,425.)

BRIEF FOR PLAINTIFFS IN ERROR.

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The S. Bobbs-Merrill Company, Indianapolis.

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CASES CITED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

THOMAS R. MARSHALL, as Governor of the State of Indiana, et al.,
Plaintiffs in Error,
v.
JOHN T. DYE,
Defendant in Error.

No. 890.
(23,465.)

BRIEF FOR PLAINTIFFS IN ERROR.

CONCISE ABSTRACT OF THE CASE.

The defendant in error brought suit in the Circuit Court of Marion County, Indiana, against the plaintiffs in error, asking that they be enjoined from taking any steps to submit to the people of the State for adoption or rejection, a proposed new constitution, as provided in Chapter 118 of the Acts of the General Assembly of Indiana of 1911.

The issue was formed by a general denial.

Rec., p. 12 (27).

It was averred in the complaint that the

> "Secretary of State is required by the statutes thereof in such case made and provided

that whenever any *proposed constitutional amendment or other question* is by law to be submitted to the people of the State for popular vote at any election to duly and within the time in the statute provided, viz., thirty days before election, certify and at the expense of the State transmit such certificate and instrument to the clerk of each county in the State (§6908 Burns 1908) for the purpose that such amendment or other question may be included in the public notice of the election required by law to be given for the same time and in the manner provided by statute in the counties and precincts in the State. *Plaintiff further says that it is provided by the statutes of this State* that whenever any constitutional amendment *or other question* is required by law to be submitted to the popular vote of all the electors of the State at any general or other election for such purpose, the State Board of Election Commissioners shall cause to be printed and provided and distributed to the several voting precincts throughout the State a statement of such questions upon the State ballots and upon the sample ballots and in such way and manner as that every elector may indicate his preference for or against any one or more constitutional amendments, *and as in favor of or objecting to any other question of fact so submitted to the popular vote* of the electors of the State at such election."

Rec., p. 2 (5).

It was also averred "that Lew G. Ellingham is the Secretary of State for the State of Indiana,"

and "that Thomas R. Marshall, *because he is Governor of the State of Indiana*, and Muter M. Bachelder and Charles O. Roemler, defendants herein, compose the State Board of Election Commissioners for the State of Indiana."

Rec., pp. 1, 2.

The cause was submitted for trial and a special finding of facts made and conclusions of law thereon stated by the court in accordance with the Indiana practice.

Rec., p. 13, paragraph 2, pp. 14-52.

The first special finding shows that the defendant in error is a resident of Marion County, Indiana, a qualified voter, and in the year 1910 paid taxes aggregating the sum of $418.44.

Rec., p. 15, paragraph 1.

It is also found that the total expense of submitting the proposed new constitution will aggregate between $1,000 and $2,000.

Rec., p. 5, paragraph 11.

That the total assessed valuation of taxable property in Indiana is such that the share of the expense of submitting the proposed constitution which will be paid by the defendant in error is infinitesimal (about one mill).

Rec., p. 50 (10).

The findings set out in detail Chapter 118 of the Acts of the General Assembly of 1911.

Rec., pp. 16-45 (83).

The court stated its conclusions of law as follows:

1. That Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana is invalid and void for lack of power in said General Assembly to propose and submit the same to the electors.

Rec., p. 51, paragraph 1.

2. That said act is void because not proposed in accordance with the provisions of the present constitution of the State of Indiana, and because the General Assembly had no power to frame and submit to the electors the said proposed new constitution.

Rec., p. 51, paragraph 2.

3. "The court concludes as a matter of law that the said act of the 67th General Assembly, containing the proposed new constitution as set forth in paragraph 2 of the special findings of fact, is void, because violative of articles 2, 4 and 5, of the ordinance of Congress of July 14, 1787, and section 4 of the act of Congress, approved April 19, 1816, to enable the people of the Indiana territory to form a constitution and State government, and the ordinance of the people of the Territory of Indiana in convention met at Corydon and adopted June 29, 1816, se-

curing to the people of Indiana proportionate representation of the people in the legislature."

Rec., p. 51, paragraph 3.

4. "The court concludes as a matter of law that the proposed new constitution set forth in the said act of the 67th General Assembly, being Chapter 118, as set forth in paragraph 2 of the findings herein, is void, being in violation of the Act of Virginia conveying to the United States the territory northwest of the river Ohio, passed December 20, 1783, and providing that States formed out of said territory shall be distinct republican States when admitted members of the Federal Union; and article 5 of the Ordinance of 1787, declaring that the States created in said territory shall be republican in form; and violative of section 4 of the Act of Congress, approved April 16, 1816, to enable the people of the Indiana Territory to frame a constitution and State government, providing that the same when formed shall be republican and not repugnant to the said ordinance, which proposition from the Congress was accepted by the said ordinance of the people of Indiana in convention adopted at Corydon on June 29, 1816, accepting the proposition of the said Congress contained in said Act of April 19, 1816; and section 4 of article 4 of the Constitution of the United States, securing to every State in this Union a republican form of government."

Rec., p. 51, paragraph 4.

5. That the plaintiff is entitled to an injunction against Ellingham, enjoining him from performing the duties required to be performed by him in the statutes of the State.

Rec., p. 52 (5).

6. That Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, their successor or successors in office, should be enjoined from causing a brief statement, or any statement, of or concerning the proposed new constitution to be printed on the State ballots to be used by the electors at the election held in November, 1912, *or at any election to be held in the State of Indiana.*

Rec., p. 52 (6).

Separate exceptions were reserved to each of these conclusions of law.

Rec., p. 53 (101).

The defendants separately and severally, and the defendant Thomas R. Marshall, as Governor of the State of Indiana, thereupon filed their written motions in arrest of judgment. Identical grounds are stated in each of said motions, which grounds are as follows:

> "The defendants, each separately and severally, move the court that the judgment in the above entitled cause be arrested for each of the following reasons, to wit:
>
> First. For the reason that the court has

no jurisdiction over the subject-matter of this action.

Second.

(a) For the reason that the court has no power to enjoin or to enforce an injunction against the Governor of the State of Indiana.

(b) For the reason that 'the courts are not given a prerogative to guard the people against themselves in the matter of adopting the organic law.'

Third. For the reason that the court does not have the power, authority or right by injunction or otherwise to interfere with, control or impede the executive department in the discharge of its functions.

Fourth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be a usurpation of judicial power.

Fifth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be null and void.

Sixth. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Art. 4, §4, of the Constitution of the United States, which guarantees to every State of the United States a republican form of government.

Seventh. For the reason that the court has no power, authority or right to decide political questions or to enjoin political action.

Eighth. For the reason that the court has no power to enjoin legislative action.

Ninth. For the reason that a judgment in accordance with the conclusions of law stated

would be in contravention of Art. 1, §1, of the Constitution of Indiana, providing that:

'All power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority and instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times an indefeasible right to alter and reform their government.'

Tenth. For the reason that a judgment herein in accordance with the conclusions of law stated would be in contravention of Art. 3, §1, of the Constitution of Indiana, by which the government of said State is divided into three separate, coordinate and independent departments.

Eleventh. For the reason that the complaint herein wholly fails to state any cause of action.

Twelfth. For the reason that the facts stated in the special finding of facts heretofore made wholly fail to establish any cause of action against the defendants."

Rec., p. 53 (102);
Rec., pp. 54-56.

The court thereupon rendered judgment in accordance with the conclusions of law as follows:

"First. That the defendant, Lew G. Ellingham, Secretary of State for the State of Indiana, and his successor and successors in office, be and he is hereby enjoined and restrained from certifying to the clerk of each or any county in the State of Indiana not

less than thirty (30) days before *the general election to be held in the month of November, 1912, or at any time*, the said proposed constitution set forth in paragraph 2 of the special findings of fact, or any question touching the same.

Second. That the defendants, Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successor and successors in office, be and they are jointly and severally enjoined and restrained from causing a brief statement or any statement of or concerning the said proposed new constitution set forth in Finding 2 above herein to be printed on the State Ballot or on any ballot or ballots to be by them or any of them or their successor or successors distributed and used by the electors of the State of Indiana *at the next general election* to be held in the State of Indiana, *or any other election to be held in said State.*"

Rec., pp. 56, 57 (109).

An appeal was thereupon prayed and granted to the Supreme Court of Indiana.

Rec., p. 57 (110).

The assignment of errors in said Supreme Court, so far as relevant at this time, is as follows:

"Appellants in the above entitled cause each jointly and severally say that there is manifest error in the judgment and proceedings in this cause in this:

First. The complaint does not state facts sufficient to constitute a cause of action.

Second. The court has no jurisdiction of the subject-matter of the action.

* * * * * * * *

Fourth. The court erred in stating each of his conclusions of law on the special findings.

Fifth. The court erred in overruling appellants' motion in arrest of judgment.

Sixth. The court erred in overruling the motion of appellant, Thomas R. Marshall, as the Governor of the State of Indiana, in arrest of judgment."

Rec., pp. 59, 60 (114), (115).

An additional assignment of errors in the same form was made by Thomas R. Marshall, as Governor of the State of Indiana; (Rec., p. 60 (116)) and by each of the other defendants, and the cause was submitted.

Rec., pp. 61-63 (118).

Afterwards, on the 5th day of July, 1912, the judgment of the Marion Circuit Court was affirmed by the Supreme Court of Indiana.

Rec., p. 65 (128).

The prevailing opinion written by Cox, C. J., was concurred in by Monks and Myers, JJ.

Rec., pp. 66-113 (186).

The dissenting opinion, written by Morris, J., was concurred in by Spencer, J.

Rec., pp. 113-131 (187).

Plaintiffs in error (appellants) thereafter filed their petition and brief for a rehearing, which petition was overruled.

Rec., p. 132 (214).

Plaintiffs in error thereupon sued out a writ of error to this Court.

Rec., pp. 132-145 (215).

ERRORS RELIED UPON.

"1. That the court erred in holding that 'the underlying question involved, out of which all the others presented grow, is simply whether the act printed as Chapter 118 is a valid exercise of legislative power by the General Assembly,' when in truth and in fact the underlying question involved in said cause was whether the judicial department of the State of Indiana had power

(1) To coerce the Governor of said State by writ of injunction;

(2) To enjoin the performance of political duties by the executive department of said State.

(3) To prevent the General Assembly from submitting a proposition to adopt a new constitution to the people of the State at a regular election in an orderly and legal manner.

(4) To prevent the people of the State from exercising their inalienable right to change, alter and reform their government except with the advice and upon the direction of the judicial department of said State.

2. By the Constitution of Indiana, adopted in 1851, and recognized by the Congress of the United States as creating a republican form of government, it is provided that:
'The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided.' (Art. 3, Sec. 1.)

And the Supreme Court of Indiana erred in holding and deciding that the assertion of power by the judicial department of said State, in enjoining the Governor of said State from taking 'care that the laws be faithfully executed,' and in enjoining the executive department from the performance of purely political duties devolved upon it by the General Assembly of said State, was not destructive of the republican form of government declared and guaranteed to said State by Article 4, Section 4, of the Constitution of the United States.

3. That the said court erred in holding and deciding that the judicial department of the State of Indiana has power to prevent the people of Indiana from exercising their indefeasible right to at all times alter and reform their government, and that it has power to enjoin the executive department of said State from submitting at a regular election, in a lawful and orderly manner, a proposition looking to the adopting of a new constitution

by the people of Indiana; and that such decision and holding, and the exercise of such authority by said department, is inconsistent with the basic principles of American government, in violation of the public right, and destructive of the republican form of government heretofore adopted by the said State of Indiana in 1851, and is violative of Article 4, Section 4, of the Constitution of the United States by which a republican form of government is guaranteed to the States of the Union.

4. That the said court erred in holding and deciding that Section 1, of Article 16, of the Constitution of Indiana, adopted in 1851, in terms as follows:

'Any amendment or amendments to this constitution may be proposed in either branch of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution.'

Furnishes the exclusive method by which

changes in the organic law of the State may be made, and that said provision excludes the General Assembly of said State from taking action looking to the adoption of a new constitution, and from framing, initiating or submitting fundamental law to the people for adoption or rejection in any other method, which said holding and decision is in conflict with the guarantee of the republican form of government contained in Art. 4, Sec. 4, of the Constitution of the United States.

5. That said court erred in holding and deciding that the General Assembly of the State of Indiana does not exercise the sovereignty of the people in determining whether a provision for the change of the constitution of said State shall be submitted to the electors of the State to be by them approved or rejected.

6. That the said court erred in holding and deciding that the General Assembly of the State of Indiana does not possess power to initiate, frame or submit a proposed new constitution to the people of said State, to be by them voted upon, because of the lack of a specific enumeration of such power in the Constitution of 1851, and that the assertion of such authority by the judicial department of the State is in contravention of Sec. 4, Art. 4, of the Constitution of the United States, guaranteeing a republican form of government to the States of the Union.

7. That the said court erred in holding and deciding that the judicial department of the State has power and authority to deter-

mine the validity of a proposed new constitution prior to the adoption of the same, and prior to the submission of the same, to the people, to be by them adopted or rejected.

8. That the said court erred in holding and deciding that the Ordinance of 1787 in aid of the Act of Virginia, ceding the territory northwest of the river Ohio, is a part of the organic law of the State of Indiana, and a limitation upon the right of the people of said State of Indiana to adopt a new constitution.

9. That the said court erred in holding and deciding that the proposed new constitution, which the General Assembly of 1911 directed should be submitted to the people at the general election in 1912 for their adoption or rejection, 'is void because violative of Articles 2, 4, and 5, of the Ordinance of Congress of July 14, 1787, and Sec. 4, of the Act of Congress, approved in 1816, to enable the people of the Indiana Territory to form a constitution and State government, and the ordinance of the people of the Territory of Indiana in convention met at Corydon and adopted June 29, 1816, securing to the people of Indiana proportionate representation of the people in the Legislature,' and that said Ordinance of 1787 is a limitation upon the provisions of the Constitution of the United States as the same apply to the State of Indiana.

10. The court erred in holding and deciding that the phrase 'proportionate representation of the people in the Legislature,' as

used in the Ordinance of 1787, is a limitation upon the provisions of the Federal Constitution, and that the meaning of said phrase is: 'The people should be represented in proportion to numbers only.'

11. That the said court erred in holding and deciding that the inherent right of the people of the State of Indiana to change, alter and reform their government is restricted and limited by the provision contained in the Constitution of 1851 for amendments thereto, and that said court in said cause, by and through the decision of the question made, presented and decided as a judicial question, undertook to compel the executive of said State and the executive department of said State to defer to and be bound by a decision which was and is destructive of a republican government in Indiana, as fixed and defined by the Constitution of 1851; and by which said decision the inherent right of the people to change, alter and reform their government is set at naught.

That said court by its said decision undertook to, and did, invoke the presumptions which are accorded to courts having jurisdiction to decide judicial questions presented to them for decision, in order thereby to make it impossible for the executive department of the said State to maintain the integrity of such department and to make the assertion of his lawful authority and the performance of his sworn duty by the Governor of said State to appear to be in defiance of and not

according to law, and to that end the said court did, by its opinion, declare that:

'This is a government of laws and all are amenable to it. To the courts the people have given the power and charged them with the duty to declare what it is; and this duty can not be lightly disregarded, however unpleasant and embarrassing it may be. Without the aid of sword or purse, courts have met with little difficulty from disobedience of their decree, and this has come equally from a generally conscientious discharge of duties by the courts and a respect for the law which is inherent in our people. When the question presented to the court is a judicial question, it would be sheer inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect upon any officer of a coordinate department by entertaining a presumption that a law declared by the courts may be disregarded.'

That the said court thereby sought to give color of authority to its assertion of the right to direct and control the executive department in the discharge of purely political functions, and to direct and control the Governor of the State in the discharge of purely executive and political duties, and to make the executive department and the Governor of said State subservient to the judicial department thereof; that the said holding and decision of said court was and is in conflict

with the Constitution of the United States, and of Article 4, Section 4, thereof, by which a republican form of government is guaranteed to the States of the Union; that the infringement of such guarantee as aforesaid is in such form and made in such manner, and accompanied by such prentense as that the United States can not enforce said guarantee through or by means of either the legislative or executive arms of its government, but that the situation so created presents a judicial question which can only be adequately disposed of by judicial power.

12 That it is provided by Section 5, Article 7, of the Constitution of Indiana, now in force, that 'the Supreme Court shall, upon the decision of every case, give a statement in writing of every question arising in the record of such case, and the decision of the court thereon.'

That the Circuit Court of Marion County, Indiana, held and decided that the proposed new constitution set out in Chapter 118 of the Acts of 1911, was in conflict with the provisions of the Ordinance of 1787, and that said ordinance limits the right of the people of Indiana to adopt a new constitution, and that the submission of said proposed new constitution to the people of the State should be enjoined because of its conflict with said ordinance.

That the record of such case in the Supreme Court presented the correctness of said ruling of the Circuit Court to said Supreme Court for decision. That such ques-

tion was properly presented upon the record of said cause, but that said Supreme Court failed and refused to give a written opinion thereon as by said section of said constitution it was required to do.

That the defendants in error contended in the Supreme Court, and that the court by its decision held, that the General Assembly of said State does not have power to initiate measures looking to the adoption of a new constitution. That the plaintiffs in error contended before said Supreme Court that the General Assembly of said State possessed all legislative authority not expressly withheld from it, and that a decision that it did not have power to cause the submission of the proposed new constitution set out in Chapter 118, of the Acts of 1911, would necessarily prevent the calling of a constitutional convention by said General Assembly; and that the power to initiate does not depend upon the method followed in the exercise thereof. That said question arose in the record of the cause before the Supreme Court, and that said court avoided giving, and did not give a decision and statement in writing upon said question.

That it was contended by the plaintiffs in error upon the trial of said cause before said Supreme Court of the State of Indiana that the plaintiff in error, Thomas R. Marshall, was sued by the defendant in error as the Governor of the State of Indiana, and not otherwise, and that under the constitution of said State his acts in enforcing the law pro-

viding for general elections in the State of Indiana were the acts of the Governor of said State, and that neither the General Assembly of said State nor the judicial department thereof could change, or require him to act in any other capacity than that of Governor of said State.

That such question arose in the record of said cause before the Supreme Court of said State, and that the said court avoided, and did not give a statement in writing of its decision thereon.

That there is and was no provision of the Constitution of the State of Indiana whereby the Governor of said State or the General Assembly thereof could compel the Supreme Court of said State to discharge its constitutional duty, and to give a statement in writing of said questions, or either of them, arising in the record of said cause. That if such questions had been decided by the Supreme Court of said State, they would have been decided according to the contention of the plaintiffs in error, and that by such decision the coordinate branches of government would have had preserved to them their constitutional rights in the State of Indiana, and that had said questions, or either of them, been otherwise decided, such decision would have been in conflict with the provision of the Constitution of the United States, guaranteeing to each State a republican form of government.

That by the decision made and the failure to include therein the propositions above

stated, the General Assembly, the executive department, the Governor, and the people of the State of Indiana were deprived of their constitutional rights, and that the people of said State were thereby deprived of their inherent right to change, alter and reform their government. That the failure of said court to give a statement in writing upon each of said questions arising upon the record of said cause was intentional and for the purpose of preventing the Supreme Court of the United States from assuming jurisdiction of said cause, and for the purpose of preventing the plaintiffs in error from prosecuting an appeal to said Supreme Court of the United States, and for the purpose of placing the said General Assembly of said State and the executive department and Governor thereof in such position that they could not disregard the mandate of said Supreme Court without subjecting themselves to the charge of being violators of law."

Rec., pp. 140-145 (235), (247).

BRIEF OF THE ARGUMENT.

The plaintiffs in error were enjoined by the Circuit Court of Marion County, Indiana, from performing certain duties which devolved upon them as officers of the executive department of said State.

Thomas R. Marshall was at the time Governor of the State. Muter M. Bachelder and Charles O. Roemler were members of the two leading political parties who had been selected by Governor Marshall thirty days prior to the general election of 1910 for the purpose of assisting him in carrying out the law providing for the holding of such election. Lew G. Ellingham was, and is, Secretary of State, of the State of Indiana.

Each and all challenged the jurisdiction of the said Circuit Court over them and over the subject-matter of the said suit, setting up specifically the guarantee contained in Article IV, Section 4, of the Constitution of the United States, and asserting that the rendition of the proposed judgment would deprive them and the State they represented of rights thereby guaranteed. The objections made are of considerable length, and appear in the record on pages 55 and 56.

The objections were renewed in the Supreme Court. (Rec., pp. 59, 60.) Two of the five judges of the Supreme Court approved the contention as appears from the dissenting opinion. (Rec., pp. 113-131.) The errors relied upon in this court continue the contention. (Rec., pp. 140-145.)

The protection of the Federal Constitution was in good faith invoked throughout the proceedings. The decision was against the rights so claimed, and this court therefore has jurisdiction herein.

Sec. 236, Judiciary Act, approved March 3, 1911.

It need not be made to appear that the judgment of the State court was erroneous in order to give this court jurisdiction. The examination to determine whether the claim is well founded involves the exercise of jurisdiction.

Chicago Life Ins. Co. v. Needles, 113 U. S. 574;
Furman v. Nichol, 8 Wall. 44;
Andrews v. Andrews, 188 U. S. 14.

The primary question, presented to the Indiana courts is stated by Judge Morris in the dissenting opinion, in terms as follows:

> "My apology for this long dissenting opinion is found in the gravity of the questions presented, and which is fully recognized by the Supreme Court of the United States and those of other States, but which is not, in my judgment, properly realized in the majority opinion.
>
> There was a time in the history of the English people, when, by the combined usurped powers of the executive and the courts, members of parliament were cast into prison, and its constitutional authority was insulted and derided by the courts until it almost ceased

to exist. The Puritans, in despair, sought asylum in America. Macaulay Hist. Eng. Vol. 1, p. 90. The court of Star Chamber, guiltiest of all in usurping power, was abolished in 1640. 4 Black. Com. 267; Hallam Const. Hist. 258, 292. Since then no English court has deigned to dictate to Parliament what laws it should, or should not, enact.

The descendants of the Puritans took no small part in framing our early American Constitutions. In all these the independence of the legislative department was thought to be impregnably guarded. Const. Indiana, Art. 4, sections 8, 9, 16. All power is inherent in the people (Const. Indiana Art. 1, sec. 1), and they alone may exercise the paramount legislative power of formulating a constitution. State v. Thorson, 9 S. D. 149, 33 L. R. A. 582. If the courts may dictate to the people in advance what provisions they may, or may not, insert in their constitutions they certainly can not be denied the lesser power of dictating to the General Assembly what laws it may, or may not, enact.

The plaintiff here comes into court, demanding in advance of the electors' expression of approval or disapproval, of what he claims is a series of constitutional amendments, the determination and adjudication of their future validity, if approved, and if, in the opinion of the court, there is a prospective invalidity, that the voters of Indiana be restrained from voting on the proposition, by enjoining the Governor and other officers from supplying them with ballots that are so

printed as to enable them to express their choice. This remarkable prayer was granted by the lower court, and is sanctioned by the majority opinion here. Since 1640, the courts of English speaking peoples have resolutely and invariably denied the existence of any such power, and I most earnestly protest against its revival now.

For the foregoing reasons, and for others set out in appellants' briefs, the Circuit Court had no jurisdiction of the cause of action, and the judgment should be reversed with instructions to sustain the motions in arrest of judgment.

Where the lower court has no jurisdiction of the subject-matter of the action, it is improper for this court to consider other question urged. State v. Thorson, supra."

Rec., pp. 130, 131.

The plaintiffs in error submit—

(1) That the facts shown by the record present a judicial question cognizable by this court.

(2) That the judicial department of Indiana has no power to control the executive department.

(3) That it has no power to enjoin the Governor from taking care that the laws be faithfully enforced.

(4) That it has no power to override the expressed will of the legislative department.

(5) That it has no power by injunction, or otherwise, to prevent the people from expressing their

wishes with regard to a change in the fundamental law of the land.

(6) That the assertion or exercise of such power by the judicial department of said State is inconsistent with the republican form of government heretofore adopted by it.

(7) That the effect of the judgment and decision of the Indiana Supreme Court, if acquiesced in and followed, would be to vest legislative and executive power in the judicial department of said State, and to thereby institute a judicial oligarchy.

The Circuit Court had no power to control executive political action and its judgment is void.

> "In a confederacy founded on republican principles and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. * * * But the authority extends no further than to a guaranty of a republican form of government which supposes a *preexisting government of the form which is to be guaranteed.* As long, therefore, as the *existing republican forms* are continued by the States, they are guaranteed by the Federal Constitution."
>
> The Federalist, No. 43, pp. 339, 340.

> "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these

departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

Art. 3, Sec. 1, Constitution of Indiana, adopted in 1851.

The judicial department of the government is without power to direct, coerce, or restrain the executive (in which is included the administrative) department of the government; nor may the former exercise any of the functions of the latter.

State v. Noble, 118 Ind. 350;
Butler v. State, 97 Ind. 373, 376;
Frost v. Thomas, 26 Colo. 222;
Woods v. Sheldon, Governor, 69 N. W. 602;
Sutherland v. Governor, 29 Mich. 320;
State v. Governor, 25 N. J. Law, 331, 349, 350;
State v. Lord, 28 Ore. 498, 43 Pac. 471;
Mississippi v. Johnson, 71 U. S. 475;
Georgia v. Stanton, 73 U. S. 50;
Decatur v. Paulding, 39 U. S. 497, 10 L. Ed. 559;
Ex Parte Ayres, 123 U. S. 443;
Elliott v. Wiltz, 107 U. S. 711, 27, L. Ed. 448;
2 High on Injunction, Sec. 1323.

The foregoing proposition is also supported by the authorities cited to the proposition following.

FACTS SHOWN BY THE RECORD PRESENT A JUDICIAL QUESTION COGNIZABLE BY THIS COURT.

The distinction "between judicial authority over justiciable controversies and legislative power as to purely political questions" is logically and definitely fixed by the decisions of this court. It is (1) "the legislative duty to determine the political questions involved in deciding whether a State government republican in form exists"; and (2) It is "the judicial power and ever present duty, whenever it becomes necessary in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."

Pacific States, etc., Co. v. Oregon, 223 U. S. 118; 56 L. Ed. 377.

The plaintiffs in error, officers of the State of Indiana chosen by the people of that State to carry out for them the mandate of the law, and therefore representative of both government and people, are enjoined by a coordinate department from doing that which they are by the Constitution, the law and their oaths obligated to do. This injunction is not issued to protect any right of person or property, but as one step in a policy of aggrandizement inconsistent with a free government, and especially inconsistent with the form of republican government adopted by Indiana.

There were two methods by which these officers might defend their rights and the rights of the people whose trustees they were. The one was to ignore and treat the judgment with contempt; to repel encroachment with force. The other was to oppose in the courts by conventional process that which it was sought to invest with vitality by conventional process and the power of precedent.

The first alternative would tend to bring the government of the State into disrepute, to disturb public tranquillity, to lessen respect for the law, and therefore this writ of error has been sued out as one step in the disposition of a lawsuit to which plaintiffs in error are involuntary parties. The attack made upon them and the people represented by them is made in form of law; it is sought to meet such attack in kind, and the defendant in error can not very well deny that the issue made by him is a judicial one.

The right which the plaintiffs in error urge in this court is the right to exercise their duties under the republican form of government adopted by the State and guaranteed by the Constitution of the United States and the right of the people to require that the republican form of government adopted by them be observed. If the facts show that an attempt is being made to prevent the exercise of the rights thus guaranteed, the remedy lies in an appeal to this Court.

Pacific States, etc., Co. v. Oregon, 223 U. S. 118.

The number of cases involving Section 4, Article 4, of the Constitution which have come to this bar is not great, but the limit of its jurisdiction as defined in the case last cited is not open to dispute.

The case of Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627, came here on a writ of error to the Supreme Court of Missouri. The plaintiff in error, who was a woman, claimed to be a voter of the State of Missouri, notwithstanding the provision of the Constitution and the laws of the State which confined the right of suffrage to men alone, asserting among other things that a form of government which did not permit women to exercise suffrage was not republican. That question was considered by this court and held against her contention. There was no suggestion that the question was not a judicial one, and the facts involved exactly bring it within the definition of a justiciable controversy as laid down by the Chief Justice in the case of Pacific States, etc., Co. v. Oregon, 223 U. S. 118.

The plaintiffs in error are availing themselves of the constitutional provision contained in Article 4, Section 4, exactly as they would in a proper case avail themselves of the constitutional provision contained in Article 1, Section 10, prohibiting the passage of laws impairing the obligation of contracts.

The courts of Indiana have no jurisdiction to restrain the governor of the State.

> "The executive powers of the State shall be vested in the governor. He shall hold his office during four years, and shall not be eli-

bible more than four years in any period of eight years."

"He shall take care that the laws be faithfully executed."

Art. 5, §§1, 16, Constitution of Indiana.

In Mississippi v. Johnson, 71 U. S. 475, 19 L. Ed. 437, the question presented to this court was stated in the opinion as follows:

> "The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?"

The opinion of the court covers the point.

> "An attempt on the part of the judicial department of the Government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'
>
> * * * * * * *
>
> It is true that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.
>
> * * * * * * * *

It will hardly be contended that Congress can interpose in any case, to restrain the enactment of an unconstitutional law, and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?

* * * * * * * *

Suppose the bill filed and the injunction prayed for are allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the Acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the Government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public wonder of an attempt by this court to arrest proceedings in that court?"

Mississippi v. Johnson, 71 U. S. 475.

Jurisdiction is the power to hear and determine; and it includes the power to enforce the execution of what is decreed.

Hopkins v. Commonwealth, 3 Mete. 460.

All jurisdiction implies superiority of power. Authority to try would be vain and idle without authority to redress. The sentence of a court would be contemptible unless that court had power to command the execution of it.

1 Blackstone's Comm. p. *242;
Commonwealth v. Dennison, 24 How. 66;
State v. Stone, 120 Mo. 428, 23 L. R. A. 194;
Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564;
State ex rel. Oliver v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712;
People v. Morton, 156 N. Y. 136, 41 L. R. A. 23;
People v. Bissell, 19 Ill. 229.

The courts have no power to commit the Governor for contempt. They have no power whatever over his person.

People v. Morton, 156 N. Y. 136;
Mississippi v. Johnson, 71 U. S. 475;
Bates v. Taylor, 3 L. R. A. 316;
Jonesboro v. Brown, 8 Baxt. 490, 35 Am. Rep. 713-15;
Vicksburg v. Lowry, 61 Miss. 102, 48 Am. Rep. 76;
In re Dennett, 32 Me. 508;
1 Blackstone's Comm. *243.

Courts of the State have no power or jurisdiction over the Governor of the State to enjoin official action in any case.

Rice v. The Governor, 207 Mass. 577, 579;
People v. Morton, 156 N. Y. 136, 66 Am. St. 547;
People v. The Governor, 29 Mich. 320, 323;
People v. Bissell, 19 Ill. 229, 231, 234;
The Governor and Supreme Court, 243 Ill. 9, 35;
People v. Hatch, 33 Ill. 9, 148;
People v. Cullum, 109 Ill. 472;
State v. Stone, 120 Mo. 428, 433;
Vicksburg R. Co. v. Lowry, 61 Miss. 102, 103;
Hawkins v. The Governor, 1 Ark. 570, 572, 575;
State v. Bisbee, 17 Fla. 67, 78-83;
State v. Warmoth, 22 La. Ann. 1;
State v. Warmoth, 24 La. Ann. 351, 352;
Rice v. Austin, 19 Minn. 103, 105;
Secombe v. Kittleson, 29 Minn. 555, 561, 12 N. W. 519, 522;
Mauran v. Smith, 8 R. I. 192, 216;
In re Dennett, 32 Me. 508;
State v. The Governor, 25 N. J. L. 331, 349;
State v. Board of Inspectors, 114 Tenn. 516, 519;
Bates v. Taylor, 87 Tenn. 319, 325;
Turnpike Co. v. Brown, 8 Baxt. (Tenn.) 490, 493;

Hovey v. State, 127 Ind. 588;
Beal v. Ray, 17 Ind. 554, 558;
State v. Huston, 27 Okla. 606, 611;

When the courts attempt to interfere with action taken by the executive department, or the legislative department, as in this case, they project themselves into a field of action which belongs to another department, and violate Section 1, Article 3, of the State Constitution.

In re Opinion of Justices, 208 Mass. 610;
94 N. E. 852, 853.

"Hence it is," says Blackstone, "that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary; for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn to punishment. * * * If such a power were vested in any domestic tribunal, there would soon be an end to the constitution by destroying the free agency of one of the constituent parts of the sovereign legislative power."

Blackstone's Comm. *243;
State v. Towns, 8 Ga. 360;
Sutherland v. Governor, 29 Mich. 320;
Chamberlain v. Silby, 4 Minn. 309;
State v. Governor, 25 N. J. Law 331.

An inferior court in Pennsylvania undertook to compel the Governor of that State to testify before its grand jury. The Supreme Court, in declaring his immunity from judical control said:

"Observe, the supreme executive power is vested in the Governor, and he is charged with the faithful execution of the laws, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy, and militia of the State. Who then shall assume the power of the people and call this magistrate to an account for that which he has done in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the commonwealth? For it certainly is a logical sequence that if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny County can shut him up in prison for refusing to appear before it and reveal the means and methods used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such a one may be com-

pelled to answer, to account, and to act. In other words, if, from such analogy, we once begin to shift the supreme executive power from him upon whom the constitution has conferred it to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better, at the outstart, recognize the fact that the executive department is a coordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that, with it, in the exercise of these constitutional powers, the courts have no more right to interfere than has the executive, under like conditions, to interfere with the courts."

Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667;

Approved in Hovey v. State, 127 Ind. on p. 595.

It is averred in the complaint that "Thomas R. Marshall, *because he is Governor of the State of Indiana*, and Muter M. Bachelder and Charles O. Roemler, defendants herein, comprise the State Board of Election Commissioners for the State of Indiana."

Rec., pp. 1, 2.

It has been argued that proof of this averment conferred jurisdiction upon the Marion Circuit Court to enjoin action by Governor Marshall as a member of the board. In a recent Illinois case the right to mandate the election board of that State to perform what was alleged to be a purely ministerial act was considered. The opinion is carefully prepared and is instructive. The position assumed by the defendant in error in this case, as above stated, was also assumed by the relator in that case, and of it the court said:

> "Counsel for the relators say that the duty which they sought to have performed by Gov. Deneen, and which he refused to perform, was not a duty enjoined upon him as Governor, but was a duty to be performed *because he was Governor*, and *therefore it was not the performance of an executive act*. To adopt that doctrine would be to locate every act of a Governor outside of the executive department, since *it is only because an individual is Governor that he can do any of the things authorized by the Constitution* and in People v. Cullum, supra, the writ was sought to compel the Governor to call an election, which was a duty prescribed by statute."
>
> People, ex. rel., v. Dunne, 101 N. E. 560.

Under the constitution, it is the duty of the Governor to "take care that the laws be faithfully executed." And when the Governor, in pursuance of his executive authority, recognizes an act as legal,

and is proceeding to execute its provisions the courts can not interfere, by injunction, with the discharge of his duties under such act, merely because it is alleged that it is unconstitutional. For the court to enjoin the Governor, to compel him to refrain from the performance of his duties under such act, would be an usurpation of authority which alone devolves upon the executive branch of the government to exercise.

Frost v. Thomas, 26 Colo. 222, 77 Am. St. 259, 260;
Mississippi v. Johnson, 4 Wall. 475;
2 High on Injunctions (4th Ed.), Sec. 1323.

The Governor, when acting as a member of the State Board of Election Commissioners, is performing an executive duty in no other or different sense than when performing any ministerial act devolving upon him as chief executive of the State.

Huidekoper v. Hadley, 177 Fed. 1, 11.

The fact that the Legislature named the Governor as one of the State Board of Election Commissioners, and his acting in such capacity, does not denude him of his high and independent position as chief executive of the State, and the head of that department. And this is true, whether the act to be performed is ministerial, executive or political.

State, ex rel., v. Board of Inspectors, 114 Tenn. 516, 519;
People v. Morton, 156 N. Y. 136, 66 Am. St. 547, 553.

The inability of the courts to enforce their judgments against the Governor is not affected by the capacity in which he is averred to be sued, or by the character of the action. They have no jurisdiction over him, whether he be described as a citizen of the State, a member of the Board, or otherwise.

> Mississippi v. Johnson, 71 U. S. 475;
> People v. Morton, 156 N. Y. 136;
> Hovey v. State, 127 Ind. 588, 599;
> Work v. Corrington, 34 O. St. 64, 32 Am. Rep. 345;
> Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564;
> Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346;
> State v. Kirkwood, 14 Iowa 162;
> Woods v. Sheldon, Governor, 69 N. W. 602;
> State v. Drew, 17 Fla. 67.

A willingness on the part of the Governor to conform to the decree of the court does not confer or amount to jurisdiction. Courts will not sit in the capacity of moot courts, pass upon questions, and enter judgments which they are powerless to enforce.

> State v. Stone, 120 Mo. 428, 23 L. R. A. 194;
> Smith v. Myers, 109 Ind. 1;
> People v. Bissell, 19 Ill. 229, 230;
> Bates v. Taylor, 87 Tenn. 319, 3 L. R. A. 316;
> People v. Morton, 156 N. Y. 136, 41 L. R. A. 23.

THE CIRCUIT COURT HAD NO POWER TO INTERFERE WITH THE EXERCISE OF LEGISLATIVE DISCRETION AND ITS JUDGMENT IS VOID.

The legislative authority in this State has the right to exercise supreme and soverign power, subject to no restriction except that imposed by our own constitution, by the federal constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws.

Beauchamp v. State, 6 Blackf. 299, 301;
Fry v. State, 63 Ind. 552, 559;
Levey v. State, 161 Ind. 251, 255;
The LaFayette, etc., Co. v. Geiger, 34 Ind. 185, 198;
State v. McClelland, 138 Ind. 321, 335, 340;
Holderich v. State, 101 Ind. 564, 567.

"Whenever a power is not distinctly either legislative, executive, or judicial, and is not by the constitution distinctly confided to a department of the government designated, the mode of its exercise, and the agency, must necessarily be determined by law; in other words, must necessarily be under the control of the Legislature."

Cooley, Constitutional Law, p. 44;
Sec. 375 Jamieson's Constitutional Conventions (4th Ed.) J. 362.

All legislative authority is vested in the General Assembly, and, as regards this authority, that body

is considered supreme and soveregin, subject to no restrictions except those which the state constitution expressly or impliedly imposes, and the restraint of the federal constitution, and the laws and treaties made pursuant thereto.

State, ex rel., v. Menaugh, 151 Ind. 260, 266.

The Legislature of the State can do any legislative act that is not prohibited by the state or federal constitutions; and without and beyond the limitations and restrictions contained in those instruments the lawmaking power of the State is as absolute, omnipotent and uncontrollable as the English Parliament.

People v. Hill, 36 L. R. A. 634, 636;
State v. Henley, 39 L. R. A. 126, 132.

The constitution has given us a list of the things which the Legislature may not do. If the courts can extend that list, they alter the instrument, become themselves the aggressors, and violate both the letter and the spirit of the organic law, as grossly as the Legislature possibly could. If the courts can add to the reserved rights of the people they can take them away. If they can mend, they can mar. If they can remove the landmarks which they find established, they can obliterate them. If they can change the constitution in any particular there is

nothing but their own will to prevent them from demolishing it entirely.

> Sharpless v. Mayor, 21 Pa. St. 147, cited and approved in State, ex rel., v. Menaugh, 151 Ind. 260, 267.

Whenever a power, either legislative, executive, or judicial, is not by the constitution distinctly confined to a department of government designated, the mode of its exercise and the agents must necessarily be determined by law; in other words, must necessarily be under the control of the Legislature.

> Cooley, Const. Law, 44.

Except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State except as those rights are secured by the constitutional provisions which come within the judicial cognizance. Protection against unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people.

> Cooley, Const. Lim. (6th ed.), p. 200;
> Burrows v. Delta Transportation Co., 106 Mich. 582, 64 N. W. 501.

No restriction upon the *making* of a new constitution are imposed by the old constitution; no lim-

itation upon the methods of making a new constitution would be binding, if imposed by the old.

> Indiana Constitution of 1816;
> Debates of Constitutional Convention.

The Indiana Supreme Court does not hold that the proposed new constitution is in itself unconstitutional. The holding is that the law by which its submission to the people is directed is unconstitutional, but *the complaint avers*:

> "Plaintiff says that the Secretary of State is required by the statutes thereof in such case made and provided that whenever any proposed constitutional amendment, *or other question*, is by law to be submitted to the people of the State for popular vote at any election to duly and within the time in the statute provided, * * *. Plaintiff further says that it is provided by the statutes of this State that whenever any constitutional amendment or other question is required by law to be submitted to the popular vote of all the electors of the state at any general or other election for such purpose, the State Board of Election Commissioners shall cause to be printed and provided and distributed to the several voting precincts throughout the State a statement of such questions upon the state ballots and upon the sample ballots and in such way and manner as that every elector may indicate his preference for or against any one or more constitutional amendments, and as in favor of

or objecting to any other question of fact so submitted to the popular vote of the electors of the state at such election."

Rec., p. 2.

And the Circuit Court found:

"That each of said named defendants, as such election commissioners, and constituting such Board of Election Commissioners, *will comply with and carry out the requirements of each and every statute of Indiana relative to the holding and conduct of said general election* to be held in 1912, so far as such requirements relate to said State Board of Election Commissioners and the act and conduct as members of such State Board of Election Commissioners, and *will do each and every act required to be done by them, according to law*, to sumbit said act * * * to the electors of the State of Indiana and to all the legal voters of said State for their adoption or rejection at said election."

Rec., p. 49 (92).

The statute to which reference is made both in the complaint and in the special findings is §6944 Burns 1908, and the constitutionality and validity of this statute is in no wise questioned. There is, therefore, an absolute lack of both averment and proof of anything which may serve as a pretext for the judgment rendered.

The judicial department of the government is without power to direct, coerce, or restrain the leg-

islative department of government; nor can the judicial department exercise any of the functions, or discharge, or prevent the discharge, of any of the functions of the latter.

Sec. 1, Art. 3, Constitution of Indiana;
Smith v. Myers, 109 Ind. 1;
Langenberg v. Decker, 131 Ind. 471;
Wright v. Defrees, 8 Ind. 298, 303;
Ex Parte Griffiths, 118 Ind. 83-85;
Carr v. The State, 127 Ind. 204, 208;
State, ex rel., Hovey v. Noble, 118 Ind. 350;
Ex Parte France, 176 Ind. 72;
Hanly v. Sims, 175 Ind. 345;
State, ex rel., v. Haworth, 122 Ind. 462;
McComas v. Krug, 81 Ind. 327;
Wilson v. Jenkines, 72 N. C. 5;
Goddin v. Crump, 8 Leigh, 154;
Burch v. Earhart, 7 Ore. 58;
Franklin v. State Board, etc., 23 Cal. 177;
People v. Pecheco, 27 Cal. 175;
Cherokee Nation v. Georgia, 5 Peters, 1;
Georgia v. Stanton, 73 U. S. 50;
Decatur v. Paulding, 39 U. S. 497;
Alpers v. San Francisco, 32 Fed. 503, 24 Am. Rep. 756;
New Orleans Water Co. v. City of New Oleans, 164 U. S. 471, 41 L. Ed. 518;
State v. Lord, 28 Or. 498, 31 L. R. A. 473, 479;
McChord v. Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289.

The holding of an election is the exercise of a political right exclusively within the domain of legislative direction, and a court of equity is without jurisdiction to interfere or restrain.

1 Pomeroy, Eq. Rem., §§324, 331, 332;
Winnette v. Adams, 99 N. W. 681;
People v. Barrett, 203 Ill. 99, 67 N. E. 742;
Dickey v. Reed, 78 Ill. 261;
Anthony v. Burrow, 129 Fed. 783;
Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721;
Green v. Mills, 69 Fed. 852;
Fletcher v. Tuttle, 151 Ill. 41;
Roudanez v. City of New Orleans, 29 La. Ann. 271, 273;
Landes v. Walls, 160 Ind. 216, 218;
People v. Galesburg, 48 Ill. 485;
Harris v. Shryock, 82 Ill. 119;
Smith v. McCarthy, 56 Pa. St. 359;
Holmes v. Oldham, 1 Hughes 76;
Weil v. Calhoun, 25 Fed. 865;
Walton v. Develing, 61 Ill. 201;
Darst v. People, 62 Ill. 306;
Parker v. State, ex rel., 133 Ind. 178;
Des Moines Gas Co. v. City of Des Moines, 44 Iowa 505.

"It [the judiciary] has a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the lawmaker."

"Under no system can the power of courts

go far to save a people from ruin; our chief protection lies elsewhere."

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that. What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every state, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the Legislature—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coordinate depart-

ment of the government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function of its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation."

Thayer, Legal Essays, 22.

The JUDICIAL department of the State has no power to ENJOIN THE PEOPLE of the State from expressing their wishes in A PEACEFUL and orderly manner with regard to a change in THE FUNDAMENTAL LAW. The basic principle upon which American institutions are founded is stated in the following extract from the Constitution of Indiana:

"We declare that all men are created equal; that they are endowed by their Creator with certain unlienable rights; that among these are life, liberty, and the pursuit of

> happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and wellbeing. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."
>
> Art. 1, Section 1, Constitution of Indiana.

The right of the people declared in the foregoing section is not made dependent upon the consent of the judicial department of the State's being first obtained.

The plaintiffs in error were enjoined from carryout the provisions of the valid and unquestioned statute.

> "Whenever any constitutional admendment, *or other question*, is required by law to be submitted to popular vote * * * the State Board of Election Commissioners shall cause a brief statement of the same to be printed on the state ballots and the words 'yes' and 'no' under the same, so that the elector may indicate his preference by stamping at the place designated in front of either word."
>
> §6944 Burns 1908.

The injunction in this case is not only against the officers, but against the electors as well.

> Walton v. Develing, 61 Ill. 201.

What can not be done directly can not be done by indirection.

In voting upon questions relating to the adoption of fundamental law, the voter exercises a legislative function and constitutes a part of the legislative branch of the government.

People v. Mills, 70 Pac. 327;
State v. Thorson, 68 N. W. 202.

When the General Assembly passes an act submitting a question to the electorate for final determination, the act is upon its passage, and is *in fieri* until it is voted upon and the result duly declared.

People v. Mills, 30 Colo. 262;
State v. Thorson, 9 S. D. 149;
Art. 3, Constitution of Indiana;
Walton v. Develing, 61 Ill. 201;
State, ex rel., v. Winnette, 78 Neb. 379, 110 N. W. 1113;
Brashear v. City of Madison, 142 Ind. 685, 691;
Threadgill v. Cross, 26 Okla. 403, 109 Pac. 558.

The making of a constitution, the enactment of organic law, the framing and establishment of the structure and mechanism of government, is legislation of the highest character. The General Assembly alone can initiate, propose and submit such legislation to the highest tribunal known to civil government—the people.

Brashear v. City of Madison, 142 Ind. 685, 691;
Eakin v. Raub, 12 Serg. & R., 330, 347;
Sage v. The Mayor, 15 N. Y. 61, 62.

The people, in their sovereign capacity in taking initiative steps in proposing or adopting a constitution, or constitutional amendments, do not act in their collective capacity, but the sovereignty of the people is exercised through their representatives in the Legislature, unless the power is elsewhere reposed. What is required in such case to be done is required of the legislative power under the constitution as it exists.

McPherson v. Blacker, 146 U. S. 1, 25

No change can be made in a constitution except by the combined action of both the Legislature and the people. The Lesislature takes the initative in all cases.

State, ex rel., v. Dahl, 6 N. Dak. 81, 34 L. R. A. 97, 98;
Westinghausen v. People, 44 Mich. 265, 6 N. W. 641, 644;
Commonwealth v. Griest, 196 Pa. St. 396, 50 L. R. A. 568, 573.

The sovereignty of the people, speaking through its representatives, the Legislature, is the final judge, whether the sense of the people on a grave issue shall be taken at the polls.

State, ex rel., v. Dahl, 6 N. Dak. 81, 34 L. R. A. 97, 98.

The people are the source of power. It is they who make and abrogate written constitutions. No executive or court has the right to step between the people's representatives and say that, without his or its approval, the people shall not be permitted to express their views on propositions to change the organic law.

Warfield v. Vandiver, 101 Md. 78, 115;
Green v. Weller, 32 Miss. 650, 684;
Commonwealth v. Griest, 196 Pa. St. 396, 50 L. R. A. 568, 571;
In re Senate File 31, 25 Neb. 864, 872;
Hollingsworth v. Virginia, 3 Dall. 378;
State v. Dahl, 6 N. Dak. 81, 34 L. R. A. 97, 98.

"The power of the General Assembly can not be distinguished from the power of a convention upon questions of submitting changes in the constitution to a popular vote."

Trustees v. McIver, 72 N. C. 76, 85.

When a body has the power of delegating authority, it has itself the power of doing the thing delegated. It may perform any act it can authorize another to do, on the principle that the less is included in the greater.

Trustees v. McIver, 72 N. C. 76, 84;
Rice v. Parkham, 16 Mass. 326, 331;
Cooley, Constitutional Limitations (1868 Ed.), p. 100.

There is nothing in the provision for submission which should cause the free exercise of it to be obstructed, or that could render it dangerous to the stability of the government; because the measure derives all its vital force from the action of the people at the ballot-box, and there never can be any danger in submitting to a free people the proposition, whether they will change their fundamental law.

Green v. Weller, 32 Miss. 650, 684.

The court erred in holding and deciding that the courts of the State have the power and authority to determine the validity of a proposed new constitution, or constitutional amendments, or the proposed submission of such constitution or amendment, prior to the time the same has been submitted to the vote of the people.

State, ex rel., v. Thorson, 9 S. Dak. 149, 33 L. R. A. 582;
Threadgill v. Cross, 26 Okla. 403, 414, 138 Am. St. 962, 973;
People v. Mills, 30 Colo. 262.

Courts pass the line of judicial authority when, by any order or in any mode, they assume to control the discretion with which the sovereign people or municipal assemblies are vested, when the people or such municipal assemblies are deliberating on the adoption or the rejection of a constitution, or constitutional amendments, by the people, or by an ordinance of the municipal assembly, which may be

proposed for adoption. The adoption or the rejection of a constitution, or of a constitutional amendment, by the people, and the passage of ordinances by municipal assemblies, are legislative acts, which a court of equity can not enjoin.

> New Orleans, etc., Co. v. New Orleans, 164 U. S. 458, 481;
> State, ex rel., v. Thorson, 9 S. Dak. 149, 33 L. R. A. 582;
> Threadgill v. Cross, 26 Okla. 403, 413;
> People v. Mills, 30 Colo. 262.

The power and jurisdiction, assumed by the court in this case, to declare the proposed constitution ineffectual, and to arrest its submission to the people, wrests from the people the expressly reserved power of the people at all times "to alter and reform their government."

> Edwards v. Lesueur, 132 Mo. 412, 31 L. R. A. 815, 819.

NO INVASION OF CIVIL RIGHT IS AVERRED OR SHOWN.

A civil right is a right accorded to every member of the State, while a political right is a right exercised in the administration of government and consists in the power to participate directly or indirectly in the establishment or *management of government*.

Fletcher v. Tuttle, 151 Ill. 41;
Giles v. Harris, 189 U. S. 475;
People v. Barrett, 203 Ill. 299, 96 Am. St. Rep., 296;
People v. Morgan, 90 Ill. 558-563;
People v. Washington, 36 Cal. 658, 662.

"In order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power. The rights in danger, as we have seen, *must be rights of persons or property*, not merely political rights which do not belong to the jurisdiction of the court either in law or in equity."

Georgia v. Stanton, 6 Wall. 50; 18 L. Ed. 721;
Mississippi v. Stanton, 154 U. S. 554;
Green v. Mills, 69 Fed. 858; 30 L. R. A. 94;
Carr v. State, 127 Ind. 208.

The purpose of this suit was to prevent the people from voting on the proposition which it was proposed to submit to them. If there is any one

act which is purely political, it is the exercise of the right of suffrage. The suit takes quality from that which it seeks to accomplish. The proposed constitution contains certain provisions which did not please Mr. Dye. He sought to keep them from being incorporated into the fundamental law of the State, not by an appeal to the judgment of the electors, but by invoking judicial process to prevent the electors from expressing their judgment. The injunction accomplished exactly what a negative vote upon the question proposed would have accomplished.

The complainant describes himself in his complaint as follows:

> "Plaintiff says he is a male citizen of the United States and over the age of twenty-one years, and has resided in the State of Indiana more than forty years continuously next before this date; and that he now resides, and for many years has resided, and will continue to reside in Washington Township, in Marion County, in the State of Indiana. That he has been during all the time of his citizenship in the State of Indiana, and now is, a taxpayer in said county and an elector, and will be entitled to vote in said township and county at the next general election to be held on the first Tuesday after the first Monday in November, 1912. And plaintiff brings this suit for himself and also for all the electors and for the taxpayers in the State of Indiana."
>
> Rec., p. 2 (4).

> "And plaintiff states that he brings this action for the benefit of himself as a citizen, elector and taxpayer in the State of Indiana, and also on behalf and for the benefit of all the other citizens, electors and taxpayers in the State."
>
> Rec., p. 9.

He brought the suit as a citizen for the benefit of himself and all other citizens; as an elector and taxpayer for the benefit of himself and all other electors and taxpayers. The office of the courts is to decide litigated cases, protecting rights of person and property. They have no authority to entertain litigation by citizens as such. They have no authority to entertain litigation by electors as such. The fact that an elector is also a taxpayer gives him no better standing as a litigant than an elector who is not a taxpayer, and so it appears upon the face of the proceedings that it is nothing except an attempt to control political action which the Governor and his subordinates were about to take in accordance with legislative direction.

There is a class of cases (of which this is not one) in which equity will interpose at the suit of a taxpayer to prevent the imposition of a tax or an assessment which by law is made a lien upon his property, and such remedy is extended in a somewhat arbitrary fashion to prevent the imposition of illegal burdens which will necessarily be discharged by taxation.

> Pomeroy, Equity Jurisprudence (2d ed.), §§260, 270.

The invasion of property right necessary to jurisdiction being thus established, and the remedy at law being less efficient, equity interferes, and in order to prevent a multiplicity of actions, the suit may be maintained jointly or by one taxpayer suing for himself and all others in his class.

In order to entitle a litigant to the benefit of this doctrine he must bring himself within its terms. The suit must really be one for the protection of a personal or property right. A complainant who sues as an elector to enjoin political action cannot give himself standing through the mere subterfuge of averring that he is also a taxpayer, and will therefore be damaged. (The finding shows the possible cost to him to be about a mill.) Such an averment is not even colorable and forms no basis for the exercise of equitable jurisdiction.

The cost of the proposed submission which would fall upon the plaintiff is too trifling, fanciful and speculative to establish irreparable injury to property rights.

1 Pomeroy, Eq. Rem., §331;
State v. Thorson, 9 S. D. 149;
1 High on Injunction, §22;;
State v. Lord, 28 Or. 498.

Courts of equity regard substance. The substance of the plaintiff's claim is not even clouded by the pretext used. "Resist the beginnings", is the maxim of a free people. No nation can remain free if its people are willing to wait until the govern-

ment has been subverted before coming to its defense.

The effect of precedent is most patent. An encroachment made under form of judicial decision is infinitely more dangerous than encroachment in any other possible way.

The judicial department of the State of Indiana by the judgment in question has claimed for itself powers vested by the constitution of the state in the executive and legislative departments of the state and authority which has never been surrendered by the people. The effect of its decision is to declare a judicial oligarchy in form of law, but in defiance of law. The Governor of the State must secure and take direction from the Supreme Court before proceeding to the discharge of his constitutional duty. The right of the people to change, alter and reform their government is qualified by the necessity of securing the previous assent of the judicial department thereto, and the function of discharging purely political duties from which the judicial department is by the Constitution expressly excluded is taken over by it.

Under this decision a circuit court can confer more authority upon its bailiff than the Constitution has conferred upon both legislative and executive departments.

WHAT THE DECISION OF THE INDIANA SUPREME COURT MEANS.

A republican form of government might perhaps have been designed and adopted without providing for a division of power. It may be that a form could have been devised vesting supreme authority in an executive body of five men, but nothing of the kind was done or attempted.

The guaranty contained in Article IV, Section 4, of the Constitution of the United States "supposes a preexisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the Federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so and to claim the Federal guaranty for the latter."

The Federalist, No. 43, p. 342.

It may be said not unreasonably, that "the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."

Texas v. White, 7 Wall. 700.

The encroachment upon the republican form of government under which Indiana holds its place in

the Union is an insidious one made under claim of duty. In the name of the law "doctrines are proclaimed which put the court over and above the law."

The majority opinion contains the following:

> "This is a government of laws and all are amenable to it. To the courts the people have given the power, and charged them with the duty to declare what it is; and this duty cannot be lightly disregarded however unpleasant and embarrassing it may be. Without the aid of sword or purse courts have met with little difficulty from disobedience of their decree and this has come equally from a generally conscientious discharge of duty by the courts and a respect for the law which is inherent in our people. Where the question presented to a court is a judicial question it would be sheer, inexcusable cowardice and a violation of duty for it to decline the exercise of its jurisdiction because of a lack of power to enforce its decree if other agencies of government should refuse to comply with it. Moreover, we have no right to reflect on any officer of a coordinate department by entertaining the assumption that the law as declared by the courts might be disregarded."
>
> Rec., p. 109 (181).

Over and against this we put the language used by one of the great judges of this court, who regarded the fundamental doctrines of liberty and

helped to weave them into the Constitution of the United States.

> "Let us suppose a union of the executive and judicial powers: this union might soon be an overbalance for the legislative authority; or, if that expression is too strong, it might certainly prevent or destroy the proper and legitimate influences of that authority. The laws might be eluded or perverted; and the execution of them might become, in the hands of the magistrate or his minions, an engine of tyranny and injustice. Where and how is redress to be obtained? From the Legislature? They make new laws to correct the mischief: but these new laws are to be executed by the same persons, and will be executed in the same manner as the former. Will redress be found in the courts of justice? In those courts, the very persons who were guilty of the oppression in their administration, sit as judges, to give a sanction to that oppression by their decrees. Nothing is more to be dreaded than maxims of laws and reasons of state blended together by judicial authority. Among all the terrible instruments of arbitrary power, decisions of courts, whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds."
>
> Wilson's Works, Vol. 1, p. 366.

The executive could have disregarded the mandate of the Supreme Court in this case, but he could

not adequately repel the attack made upon the republican government of Indiana under form of judicial decision.

Authority to direct its coordinate departments in their own spheres has been declared in the name of the law by the highest court of the State and a record made which, unrevoked, stands as warrant therefor, a record that will gain authority by the lapse of time and the calm assumption of a veto power over the people of the State desiring to change, alter and reform their government, makes a most dangerous precedent and one which ought not to stand.

If we have shown that the judgment of the State court was beyond its power, those parts of the opinion which do not have to do with that question are immaterial for the reason, as stated by Morris, J., "when the lower court has no jurisdiction of the subject-matter of the action, it is improper for this court to consider other questions urged."

Rec., p. 131.

And by Elliott, J., in Smith v. Myers, 109 Ind. 1, 9, as follows:

> "It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would

> be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody."

This consideration operates to excuse discussion here of propositions enunciated in the opinion other than those addressed to the question of power, and the lack of such discussion will not, we hope, be understood as in any wise implying assent to those phases of the opinion.

A CITIZEN OF THE UNITED STATES.

I.

In the view of this appeal which is bound to be taken by the defendant in error, there would indeed be occasion for examining the announcement of the propositions in the opinion of the Indiana Supreme Court relative to the adoption and change of fundamental law.

Plaintiffs in error are citizens of the United States as well as citizens and officers of the State of Indiana. They are here representing the citizenship of the State of Indiana by virtue of authority conferred upon them to do so in a conventional and regular manner. If the decision of the Indiana Supreme Court is expressive of the law of Indiana, the inquiry arises as to whether such law abridges the privileges and immunities of these citizens of the United States.

One privilege conferred upon a citizen of the United States is to live under a republican form of government. (Art. 4, Section 4.) The benefit of the writ of habeas corpus is another privilege belonging to him. (Art. 1, Sec. 9.) To peaceably assemble and petition for redress of grievances is another. (First Amendment.) And there are many others which have been, and others still, which will be, judicially declared as occasion arises.

> Slaughter-House Cases, 16 Wallace 36; Crandall v. State of Nevada, 6 Wallace 36.

It is the right of the people in a government, republican in form, to peaceably "alter or abolish it and to institute a new government, laying its foundation on such principles and organizing its powers in such form as *to them* shall seem most likely to effect their safety and happiness." (Declaration of Independence.)

> "We declare that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasable right to alter and reform their government."
>
> Art. 1, Sec. 1, Constitution of Indiana.

The assertion of this inherent right by the people as against a monarchial government was by force of arms. When the citizens of a State in the Union propose to alter and reform the government of such State, they have assurance from the Constitution of the United States that as citizens of the United States such change may be accomplished by peaceable and orderly methods.

The opinion of the Indiana Supreme Court declares that a provision inserted in the present Constitution of that State, providing a method by which amendments thereto might be made, excluded subsequent generations not only from otherwise amending that instrument, but from formulating or adopting a new constitution.

Rec., p. 80, last paragraph, to p. 87;
Rec., p. 141.

It applies to the existing constitution the rule of construction that "where the means by which a *power granted* shall be exercised are specified, no other or different means for the exercise of the power can be implied, even though considered more convenient or effective than the means given in the Constitution."

Rec., p. 92 (160).

This rule, applicable to legislative acts, has no possible application to a constitution. That it is thus invoked most vividly illustrates the point that under this opinion an inalienable right, belonging to

citizens of the United States, is denied them by the law of the State of Indiana, if this be the law.

The people of Indiana may make and unmake constitutions because the right to do so is a natural, inherent one, secured to them by the Constitution of the United States; not because power to do so was granted to them by the framers of the Constitution of 1851. Such power could not be thus given, for it already was. It could not be taken away from subsequent generations, for the hour that a child is born, it is his.

If the view of the defendant in error be allowed and the authority of the Supreme Court to decide be granted, and if the opinion holds as it says, then we assert that citizens of the United States and of Indiana are deprived of the inherent right to change, alter and reform their government as seems to them best calculated to effect their safety and happiness, and that the remedy for such deprivation of right lies in an appeal to this court.

II.

If the existence of power in the Indiana court to decide be assumed, and if it be not admitted that the decision in question denies the right to change fundamental law in that State in any other manner than as specified by Section 1 of Article 16 of the Constitution of Indiana, yet the opinion still withholds from the citizens of that State privileges ("rights" is a more suitable term) guaranteed to

citizens of the United States by the Constitution of the United States.

The opinion in question contains much which seems to have been intended as a vindication of Chief Justice Marshall and the decision in Marbury v. Madison, and a defense of the judicial function in the exercise of which unconstitutional laws are declared void.

Rec., pp. 96-99.

If Thomas Jefferson were living, it is not likely that he would at this day controvert the present state of the law upon that subject. Neither is it believed that Chief Justice Marshall would agree that the people of Indiana can only adopt a new constitution when the Supreme Court of that State, in its divided wisdom, shall have first approved both the subject-matter of the instrument and the means adopted to formulate and submit it. Constitutions derive their life from the people. Historically, it is true that it has not mattered who the draftsman was, what paper or what pen he used, so that in orderly procedure the question of adoption has been duly submitted and fairly answered.

It is said in the opinion, referring to some of the illustrations of this historical fact, that they are "obviously distinguishable."

Rec., p. 91 (159).

Does "obviously distinguishable" mean that the people of Indiana do not have the same inherent

right to vote upon the adoption of a new constitution, in accordance with the legislative authority and under executive direction, that the people of Nebraska, or any other State of the Union, have or had?

The right of the people of Indiana to adopt such a constitution as it suits them to adopt is by the opinion in question qualified so that they may now make such constitution upon the condition precedent that it may suit or please the ninety-two circuit courts and possibly the Supreme Court of the State to have them so do.

What may suit or please the judicial department of the State government is entirely immaterial. Usually, changes in government are made because of abuse in government. Must the consent of those who are to be reformed be obtained before reformation may even be considered? Such a qualification upon the right of a citizen of the United States to mould the republican form of government as seems best to him is inconsistent with American institutions.

In the trial court the defendant in error proceeded upon the following hypothesis:

> "Why submit a void proposal to the people and incur the trouble and expense in connection therewith? Reason would seem to dictate that when a new constitution is proposed * * * in defiance of the constitutional command, * * * that the judicial department could be invoked to inquire into and

> determine such validity, and thereby save the submission of a void constitution * * * to the people and the trouble and expense in connection therewith."
>
> (Extract from opinion of the Judge of the Marion Circuit Court.)

When the cause came on for hearing in the Supreme Court, it was urged by the learned counsel for the defendant in error that an injunction was necessary because if the question which it was proposed to submit to the people was submitted to them and answered affirmatively, it would thereafter be impossible to obtain any relief, for the reason that such new constitution would thereafter be the constitution of the State, binding upon officers holding under it.

We respectfully request that the learned counsel for the defendant in error state the view now held by him upon this subject.

It is lawful for the people of Indiana to adopt a new constitution. If the adoption of the proposed new constitution by the electors will make it the constitution of the State, then the judgment of the court operates to prevent the accomplishment of a lawful act. It prevents the performances of an act of extraordinary legislation by those alone who can perform it, upon the possible ground that the method followed is not in accordance with the procedure which the court regards as regular, although the course to be followed is a matter for the legislative

body alone. To prevent the citizens of the State from exercising the power which has not been by them delegated to some department of government is an unwarranted interference with the privileges of American citizenship. This court has not failed at any time to protect delegated rights and to secure the benefit of such rights to those who are entitled thereto. The protection of reserved rights and of the greater body of people by whom and to whom they have been and are reserved is a matter not only of equal, but of greater concern. That the reserved rights of the people shall be held inviolate and that the exercise of such rights be unimpeded is essential to the maintenance of public institutions and the continuance of free government in America.

THE ORDINANCE OF 1787.

The Circuit Court also held that the Ordinance of 1787 and Section 4 of the Act of Congress approved April 19, 1816, to enable the people of Indiana Territory to form a constitution and State government, is in itself an instrument limiting the power of the government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of the States to be carved out of that Territory, and that it is still in full force and effect.

Rec., p. 51, 3d and 4th Conclusions of Law.

Section 5, Article 7, of the Constitution of Indiana, now in force, declares that "the Supreme Court shall, upon the decision of every case, give a statement in writing of every question arising in the record of such case, and the decision of the court thereon.

The Circuit Court held that the proposed new constitution was in conflict with the provisions of the Ordinance of 1787; that said ordinance limits the right of the people of Indiana to adopt a new constitution, and that the submission of said proposed new constitution to the people of the State should be enjoined because of its conflict with such ordinance.

The correctness of this holding was challenged by the plaintiffs in error, and the record presented the correctness of such ruling of the Circuit Court to the Supreme Court. The matter was argued both in the briefs and orally. The Supreme Court violated the Constitution of Indiana, and made no statement in its opinion relative to this matter.

The contention of the plaintiffs in error here is that the affirmance of the judgment, *ipso facto*, affirmed the conclusions of law upon which the judgment was based, and that the Supreme Court of Indiana can not by disregarding its constitutional duty as aforesaid deprive this court of jurisdiction over the Federal question. It could have followed the decisions of this court and declared that said ordinance was not now effective. It refused to do so, and by such refusal impliedly announced that it ap-

proved of the contrary doctrine declared by the Judge of the Marion Circuit Court. The true doctrine seems not to be open.

> "But the Ordinance of 1787, as an instrument limiting the powers of government of the Northwest territory, and declaratory of certain fundamental principles which must find place in the organic law of States to be carved out of that territory, ceased to be, in itself, obligatory upon such States from and after their admission into the Union as States, except in so far as adopted by such States and made a part of the law thereof. This has been the view of this court, so often announced as to need no further argument."
>
> Cincinnati v. Louisville, etc., R. Co., 223 U. S. 390. (Citing cases.)

* * * * * * * * *

IT WILL BE THE DUTY OF THE EXECUTIVE OFFICERS TO SUBMIT THE PROPOSED QUESTION AT THE NEXT GENERAL ELECTION AFTER THE JUDGMENT ENJOINING THEM HAS BEEN REVERSED.

The plaintiffs in error are enjoined and restrained from causing a brief statement or any statement concerning said proposed new constitution to be printed on the State ballots "at the next general election to be held in the State of Indiana, or at any other election to be held in said State."

Rec., p. 57 (109).

The fact that the general election of 1912 has been held does not affect the question presented to this court.

> "Where a thing is to be done on or before a certain date, if a literal compliance as to the date becomes impossible without fault of the power which created the duty, the thing may be done or the act performed as soon as it becomes possible to be done after the time fixed has passed."
>
> Commonwealth, ex rel., Elkins, v. Greist, 196 Pa. St. 396; 50 L. R. A. 563.

The provision as to time is directory where strict compliance with the time limit is not essential.

> "It has often been held, for instance, where an act ordering a thing to be done by a public body or public officers, and pointing out the specific time when it was to be done, that the act was directory only and might be complied with after the prescribed time. Such is, indeed, the general rule unless the time specified is of the essence of the thing or the statute shows it was intended as a limitation of power, authority or right."
>
> Commonwealth v. Greist, supra.

There being no method prescribed by the Constitution of Indiana for the making of a new constitution, the right to initiate action in regard thereto was unquestionably reserved in the people, and the usual and ordinary method of giving expression

thereto was through the Legislature. The court had no more right to strike down a proper statute submitting a proposed new constitution to the electorate than it had to enjoin the use of the elective franchise. There is no exclusive way in which a new constitution shall be framed and submitted. In fact submission to the electorate has not been regarded a necessity as the adoption of the Indiana Constitution of 1816 shows. The federal guaranty of a republican form of government is a political right not within the domain of the judiciary. It is as much of an encroachment for the judiciary to veto the exercise of such right as it would be for the legislature to abolish the court. In either case it logically ends at nothing short of destruction to the government.

The courts do not, as the Indiana Supreme Court assumes, have jurisdiction to determine the quality of political action. Whether the proposed constitution was wise, or unwise, whether it, if adopted, would have infringed upon the defendant in error's privileges, were questions purely political which the people had a right to determine, without the exercise of any benevolent guardianship by either the executive or the judicial departments. The unwarranted obstruction of this judgment to the maintenance of a republican form of government can be removed only by this court which ever guards the integrity of the Federal Constitution. And though this court has not jurisdiction over the subject-mat-

ter of such political action, it nevertheless has the power to set aside erroneous orders of lower courts which obstruct the exercise of purely political rights. Especially is this true where the right sought to be exercised and which is obstructed, is one springing from the fountain of liberty—from the people themselves in their quest to reform their defective fundamental law.

We respectfully submit that the judgment of the Indiana Supreme Court ought to be reversed and the petition of the defendant in error dismissed for want of jurisdiction.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THOMAS R. MARSHALL ET AL.,
Plaintiffs in Error,
v.
JOHN T. DYE,
Defendant in Error.

No. 401
(22,485.)

BRIEF FOR DEFENDANT IN ERROR.

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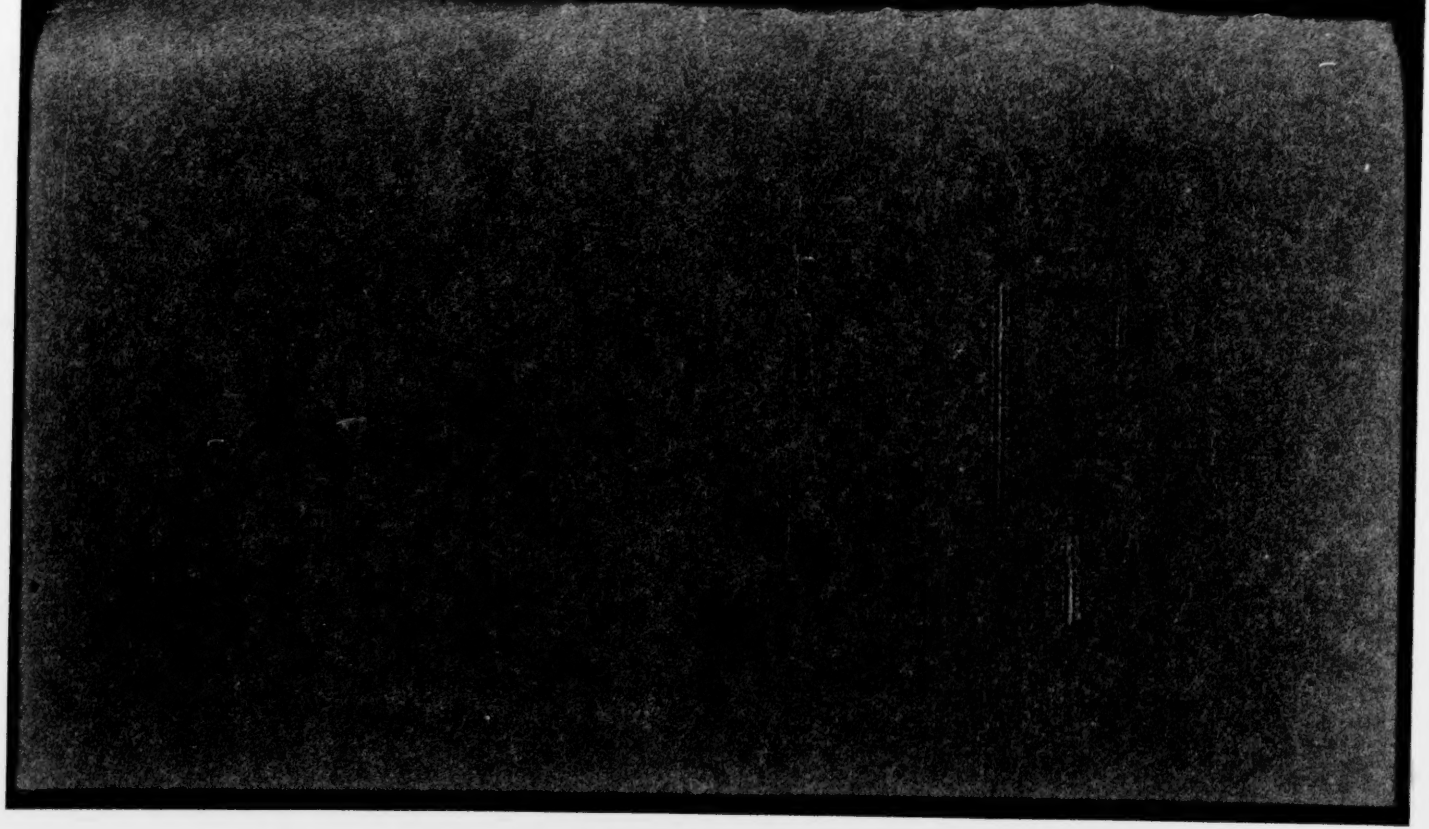

SUBJECT-INDEX.

CASES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

THOMAS R. MARSHALL ET AL.,
Plaintiffs in Error,
v.
JOHN T. DYE,
Defendant in Error.

No 890.
(23,465.)

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

THE CASE TERSELY STATED.

The Constitution of the State of Indiana which took effect on November 1, 1851, contains the following article:

"*Article 16. Amendments.* 1. Any amendment or amendments to this constitution may be proposed in either branch of the General Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of the State; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution.

"2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately; and while an amendment or amendments which shall have been agreed upon by one General Assembly shall be awaiting the action of a succeeding General Assembly, or of the electors, no additional amendment or amendments shall be proposed."

The statutes of Indiana so far as material to this case are as follows:

(Section 6907, 2 Burns Annotated Indiana Statutes 1908.)

"Whenever a proposed constitutional amendment or other question is to be submitted to the people of the State for popular vote, the Secretary of State shall duly, and not less than thirty days before election, certify the same to the clerk of each county in the State, and the clerk of each county shall include the same in the publication provided for in section 23 of this act."

(Section 6897, 2 Burns Annotated Indiana Statutes 1908.)

"The Governor of the State, and two qualified electors by him appointed, one from each of the two political parties that cast the largest number of votes in the State at the last preceding general election, shall constitute a State board of election commissioners. Such appointments shall be made at least thirty days prior to each general election, and if, prior to that time, the chairman of the state central committee of either of such parties shall nominate in writing, a member of his own party for such appointment, the Governor of the State shall appoint such nominee. In case of death or disability of either appointee, the Governor of the State shall notify the chairman of said central committee of such appointee's political party, and such chairman may, within three days thereafter, recommend a successor, who shall thereupon be appointed: *Provided*, That if such chairman shall fail to make recommendations of appoint-

ment within the time specified, the Governor of the State shall make such appointment of his own selection from such political party. It shall be the duty of said board to prepare and distribute ballots and stamps for election of all officers for whom all the electors of the State are entitled to vote. In compliance with the provisions of the election law. The members of such board shall serve without compensation."

(Section 6944, 2 Burns Annotated Indiana Statutes 1908.)

"Whenever any constitutional amendment or other question is required by law to be submitted to popular vote, if all the electors of the State are entitled to vote on such question, the state board of election commissioners shall cause a brief statement of the same to be printed on the state ballots, and the words 'yes' and 'no' under the same, so that the elector may indicate his preference by stamping at the place designated in front of either word. If the question is required by law to be voted on by the electors of any district or division of the State, the board or boards of election commissioners of the county or counties including or included in such division or district, shall cause similar provision to be made on the local ballots. In case any elector shall not indicate his preference by stamping in front of either word, the ballot as to such question shall be void and shall not be counted."

On March 4, 1911, the General Assembly of the State of Indiana passed an act entitled as follows:

"An act to submit to the voters of the State of Indiana at the general election to be held on the first Tuesday after the first Monday in November, 1912, a new constitution permitting the same to be adopted or opposed by any political party, and if so adopted or opposed providing the method in which the same shall become a part of the party ticket, providing for the canvass of the votes and the proclamation of the Governor announcing its adoption or rejection, and other matters connected therewith."

which act is numbered and is designated in the pleadings and opinion of the Supreme Court of Indiana as "Chapter 118."

The first section of the act reads as follows:

"Section 1. Be it enacted by the general assembly of the State of Indiana, That at the general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, there shall be submitted to all the legal voters of Indiana, for adoption or rejection, the following proposed new constitution:"

Then follows the so-called proposed constitution as a part of said section. The same appears at full length in the transcript, beginning at page 16.

Section 3 of said act reads as follows:

"Section 3. All election officers and other officials required by law to perform any duties with reference to general elections, shall perform like duties with reference to the submission of this question to the people."

(Acts of 1911, p. 205 *et seq.*)

Shortly after the act took effect by the Governor's proclamation, which was made on the 21st day of April, 1911, Mr. John T. Dye, a male citizen of the United States and of the State of Indiana, over twenty-one years of age, and a property holder and taxpayer and an elector in said State residing in Marion County, Indiana, brought his action in the Marion Circuit Court, to enjoin Lew G. Ellingham, Secretary of State for the State of Indiana, from certifying to the clerk of each county in the State said proposed new constitution, and also to enjoin the State Board of Election Commissioners, consisting of Thomas R. Marshall, Muter M. Bachelder, and Charles O. Roemler, from causing to be printed on the state ballots to be prepared for the gen-

eral state election to be held on the 5th day of November, 1912, a statement as required by said Section 6944. The Bill of Complaint is found in the transcript, beginning at page 1, folio 3, and continuing to page 11, folio 23. The Bill of Complaint is grounded upon the fact that said act, Chapter 118, is unconstitutional and void under the existing Constitution of the State of Indiana. The first specification or reason reads as follows:

"1. The instrument made and set forth in said Chapter 118 and therein required to be submitted to all the voters of the State at the general election to be held upon the first Tuesday after the first Monday in the month of November, 1912, for adoption or rejection and called in said chapter a 'proposed new constitution' is, and the said act is, null and void because that the said general assembly sitting in the year 1911, and being the 67th regular session of the general assembly of the State of Indiana, had no legislative or other power under the present constitution of this State to frame or to submit to the people said instrument in manner and form as therein set forth. And so the said act is unconstitutional, null and void". (Transcript, page 3 foot *et seq.*)

Many other reasons are pleaded specifically and at length why the said act is unconstitutional.

The defendants appeared, filed no demurrer, but took issue as follows:

"Defendants herein for answer to the plaintiff's complaint say that they deny each and every material allegation therein contained". (Transcript, p. 12, folio 27.)

The practice code of Indiana provided in substance that—"When one of the parties request it with a view of excepting to the decision of the court upon the questions of law involved in the trial * * * the court shall first state

the facts in writing, and then the conclusions of law upon them, and the judgment shall be entered accordingly." (1 Burns Annotated Statutes, 1908, Sec. 577.)

The case coming on for trial on June 15, 1911, the defendants filed the following request:

"The defendants request the court to find the facts in the above entitled cause specially and to state his conclusions of law thereon." (Tr., p. 13.)

And thereupon the trial proceeded, and afterwards on the 6th day of October, 1911, the court filed the special finding of facts beginning on Transcript, page 14, folio 30, and continuing to the foot of page 50. The conclusions of law are found on pages 51-52. The court found that Mr. Dye was a natural born male citizen of the United States who had resided in Marion County, Indiana, for more than fifty years last past; that he is an elector and qualified voter, and property holder and a taxpayer in said county, and stated he would vote at his precinct at the next general state election. That Thomas R. Marshall was elected Governor at the general election of 1908 for the term of four years and that as such officer he appointed Muter M. Bachelder and Charles O. Roemler as members of the State Board of Election Commissioners for the State. That they accepted and qualified, and together with the defendant Thomas R. Marshall constitute the State Board of Election Commissioners.

That the defendant Lew G. Ellingham was elected Secretary of State at the general election of 1910, for the term of two years, and that he qualified and is discharging the duties of said office and that he had made no certificate to the county clerks as provided by section 6907 (Tr., p. 48), but that he would do so unless enjoined. That the said State

Board of Election Commissioners had done no act provided under said section 6944 and other duties as provided in said Chapter 118, but would do so unless enjoined from so doing and would cause to be printed on the state ballots to be voted at the general election in 1912 a brief statement of said act, Chapter 118. (Tr., p. 48, folio 91.)

Upon these facts the court made seven conclusions of law; the First reading as follows:

"*1st Conclusion of Law.*

"The court concludes as a matter of law upon the foregoing facts that the law of the case is with the plaintiff; and the act approved March 4, 1911, being Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana, submitting the proposed new constitution set forth in Paragraph 2 of the facts above found, is invalid and void for lack of power vested in 67th General Assembly of the State of Indiana to propose and submit the same to the electors of the State in the manner in which it is proposed therein."

Other conclusions of law read as follows:

"*2nd Conclusion of Law.*

"The court concludes as a matter of law upon the facts set forth in the special findings that the act, approved March 4, 1911, being Chapter 118 of the Acts of the 67th General Assembly of the State of Indiana, submitting the proposed new constitution, is invalid and void because not proposed in accordance with the provisions of the present constitution of the State of Indiana but in violation thereof; and because in the exercise of legislative power as given to the said General Assembly in and under the Constitution of the State of Indiana the said Assembly had no power to frame and submit to the electors of the State of Indiana the said proposed new constitution in the special findings set forth, and the said act is unconstitutional, null and void."

"*5th Conclusion of Law.*

"The court concludes, upon the said facts that the law is with the plaintiff; and that he is entitled to have an injunction against the defendant Lew G. Ellingham, Secretary of State for the State of Indiana, enjoining him from certifying to the clerk of each or any county in the State not less than thirty days before the election to be held in November, 1912, or at any time, the said proposed constitution set forth in paragraph 2 of the special findings; or any other question touching the same.

(Section 6909.)

"*6th Conclusion of Law.*

"The court concludes as a matter of law upon the said facts that the State Board of Election Commissioners, named in said finding, to wit: Thomas R. Marshall, Muter M. Bachelder, and Charles O. Roemler, their successor or successors in office, should be enjoined from causing a brief statement or any statement of or concerning the said proposed new constitution, set forth in Finding 2 above, to be printed on the state ballots or on any ballots to be provided, distributed, and used by the electors of the general election to be held in November, 1912; or at any election to be held in the State of Indiana; and that the plaintiff is entitled to have an injunction preventing the same being done in whole or in part."

To each conclusion each defendant excepted separately. (Tr., pages 52-53.)

No motion was made for a new trial and the evidence is not in the record. Motions in arrest of judgment were filed and overruled, and on plaintiff's motion for judgment in his own favor on the conclusions of law stated on the special findings of fact, the court made the judgment as follows:

JUDGMENT.

"*First.* That the defendant, Lew G. Ellingham, Secretary of State for the State of Indiana, and his successor and successors in office be, and he is hereby enjoined and restrained from certifying to the clerk of each or any county in the State of Indiana not less than thirty (30) days before the general election to be held in the month of November, 1912, or at any time, the said proposed constitution set forth in Paragraph 2 of the Special Findings of Fact, or any question touching the same.

"*Second.* That the defendants, Thomas R. Marshall, Muter M. Bachelder and Charles O. Roemler, composing the State Board of Election Commissioners, and their successor and successors in office, be and they are jointly and severally enjoined and restrained from causing a brief statement of or concerning the said proposed new constitution set forth in Finding 2 above herein, to be printed on the State ballot or on any ballot or ballots to be by them or any of them or their successor or successors distributed and used by the electors of the State of Indiana at the next general election to be held in the State of Indiana, or any other election to be held in said State.

"*Third.* It is further ordered and adjudged that the plaintiff recover of the defendants his costs and charges herein taxed at $———. (Tr., pp. 56-57.)

Mention of a federal question was for the first time made in the motions in arrest of judgment in these words:

"*Sixth.* For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Article 4 * * 4 of the Constitution of the United States which guarantees to every State of the United States a republican form of government." (Tr., p. 54.)

And the fifth assignment in the separate motion made by Thomas R. Marshall, as governor, reading:

"*Fifth.* For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Article 4 * 20 of the Constitution of the United States which guarantees a republican form of government to every State of the United States."

The assignments of error in the Supreme Court were to the effect, first, that the complaint did not state a sufficient cause of action, and second, that the court had not jurisdiction of the subject matter of the action; fourth, the court erred in stating each of his conclusions of law upon the special findings; fifth, the court erred in overruling the appellants' motion in arrest of judgment; sixth, the court erred in overruling the motion of appellant Thomas R. Marshall in arrest of judgment. (Tr., pp. 59, 60, 61, 62, 63 64.)

On final hearing, the Supreme court "being advised in the premises affirms the judgment of the court below with the following opinion pronounced by Cox, Chief Justice, and a dissenting opinion pronounced by Morris, J., in which Spencer, J., concurs:" (Tr., page 65, folio 128.)

The opinions are set out in full in the Transcript, the opinion of the court begins at page 66, and the dissenting opinion begins on page 113.

THE QUESTION DECIDED.

The Chief Justice stated the case as follows:

"The underlying question involved, out of which all others presented grow, is simply whether the act printed as Chapter 118 is a valid exercise of legislative power by the General Assembly." (Tr., p. 67.)

The court decided it was not.

"We find as indicated that the act of March 4, 1911, known as Chapter 118 is in violation of the Constitution and void; and the judgment of the lower court is affirmed." (Tr., p. 113.)

Ellingham v. Dye, 99 N. E. 1.

The act being violative of the Constitution of the State, because not a valid exercise of legislative power, no other question could be adjudicated.

And so the Supreme Court of Indiana said in this case:

"Sound legal and political principles, the history of our political life as a State, and the authority of judicial and commentatorial opinion, all unite in forcing the conclusion that the act of 1911 is invalid for want of power in that body to draft an entire constitution and forthwith submit it to the people under its general legislative authority if the instrument be conceded to be a new constitution and not merely amendments; and that, if it be considered as merely a series of amendments, it is a palpable evasion and disregard of the requirements and checks of Article 16, and is for that reason void. This conclusion renders unnecessary any consideration of the other objections raised against the validity of the act." (Tr., p. 95.)

Ellingham v. Dye, 99 N. E., p. 18-19.

THIS IS NOW A MOOT CASE AND SHOULD BE DISMISSED.

The act of 1911 (Chapter 118) declared that the "proposed new constitution" should be submitted to all the legal voters of Indiana for adoption or rejection "at the general election to be held on the first Tuesday after the first Monday in the month of November, 1912."

The Constitution provides that: All general elections

shall be held on the first Tuesday after the first Monday in November.

Article 2, Section 14, 1 Burns, Section 95.

The "proposed new constitution" was not submitted to or voted on by the electors on that day nor at any time.

After the decision of this case the General Assembly on March 15, 1913, passed an act which provides that the voters at the regular election to be held in November, 1914, shall "vote for or against the calling a convention to alter, revise, or amend the Constitution of the State of Indiana, or to formulate a new constitution if deemed advisable."

The act further provides if a majority of the voters voting at the November election, 1914, be in favor of calling a constitutional convention, then a special election shall be held on the first Tuesday after the first Monday in March 1915, to elect delegates to the Constitutional Convention which shall assemble in Indianapolis the first Monday in May, 1915.

Acts 1913, p. 812, sections 1, 2, 8, 13.

So that, *first* no election can be held under the act of March, 4, 1911, as the time fixed has passed, and, *second*, the act of March 15, 1913, provides another and subsequent method of changing the existing Constitution, which necessarily repeals the first act if it were a valid law.

It follows that this case is now a moot case and should be dismissed.

Mills v. Green, 159 U. S. 651, 653;

State of Pennsylvania v. The Wheeling and Belmont Bridge Co., 18 How. 421;

California v. San Pablo and Tulare R. Co., 149 U. S. 308, 314;

New Orleans Flour Inspectors v. Glover, 160 U. S. 170;
Jones v. Montague, 194 U. S. 147, 151;
Tennessee v. Condon, 189 U. S. 64;
Richardson v. McChesney, Secretary of State, 218 U. S. 487.

This court will take judicial notice of the beginning and ending of the terms of Thomas R. Marshall, as Governor of Indiana, Lew G. Ellingham, as Secretary of State thereof, and of the beginning and duration of the terms of Muter M. Bachelder and Charles O. Roemler as the other members of the State Board of Election Commissioners. It is well settled that this court takes judicial notice of State constitutions, State statutes, and who are State officers, and all matters of which the courts of Indiana take notice in this case.

Richardson v. McChesney, 218 U. S. 487;
Brown v. Piper, 91 U. S. 37;
Daniels v. Tearney, 102 U. S. 519;
Mills v. Green, 159 U. S. 651;
Jones v. Montague, 194 U. S. 147;
Codlin v. Kohlhausen, 181 U. S. 151;
Tennessee v. Condon, 189 U. S. 64.

The Supreme Court of Indiana takes judicial notice of state elections and returns, and of official matters of general importance appearing upon the records in the public office of the Secretary of State and other State officers.

In re Denny, 156 Ind. 104;
State v. Patterson, 116 Ind. 45;
Copeland v. State, 126 Ind. 57;
Board v. May, 67 Ind. 562;
Nitche v. Earle, 117 Ind. 270;
State v. Gramelspacher, 126 Ind. 398;

Jeffersonville v. Louisville, etc., Co., 169 Ind. 645;
State v. Bigler, 171 Ind. 646.

It will not be maintained on behalf of plaintiffs in error that any election was had in the matter of the adoption or rejection of the proposed new constitution. Their brief admits the contrary. (P. 31, 42, 65, foot.) Of course if the election had been held plaintiffs in error could not have brought the record here under any view.

Again the writ of error was not even sued out until November 26, 1912 (Tr., p. 32), whereas the general state election at which the proposed new constitution was to have been submitted was on the 5th day of November, 1912.

The term of office of Thomas R. Marshall, as Governor of Indiana, expired January 11, 1913.

The term of office of Lew G. Ellingham, as Secretary of State of Indiana, expired November 27, 1912.

On the 23d day of August, 1912, Will H. Thompson and John Hollett were appointed as members of the State Board of Election Commissioners which terminated the appointments of Muter M. Bachelder and Charles O. Roemler on that date.

The Court will take judicial notice of the public records of the State in the office of the Secretary of State that no returns were made or canvassed of any vote on the proposed new Constitution. So that this case falls within the rule, that if from any cause it becomes "impossible for this Court to grant him (appellant) any effectual relief whatever, the Court will not proceed to a formal judgment but will dismiss the appeal."

Mills v. Green, 159 U. S. p. 653.

"The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances there is nothing but a moot case".

Richardson v. McChesney, 218 U. S. p. 492.

THE PLAINTIFFS IN ERROR HAVE NO PERSONAL INTEREST AND HAVE NOT BEEN HURT.

The plaintiffs were state officers. They had no personal interest in the litigation. The case being decided against them in the Marion Circuit Court, they sought the advice of the Supreme Court of their State on appeal whether they should obey the judgment below; and the Supreme Court decided they should, and they did. They have no right therefore to bring the case here.

Smith, Auditor of Marion County v. Indiana, 191 U. S. 138, 148;
Braxton County Court v. The State of West Virginia, 208 U. S. 192.

In Smith's case an action was brought against him as the Auditor of Marion County to compel him to allow a certain amount of property to be exempt from taxation as authorized by a certain act of the General Assembly of Indiana. The question was whether the act was unconstitutional as the Auditor insisted. The circuit court held it to be void. The Supreme Court on appeal held the act to be valid, and remanded the case to the lower court, where the Auditor answered at length that it was invalid both under the constitutions of the State, and the United States. The trial court then held the statute valid, and Smith appealed to the Supreme Court, where the case was affirmed, and Smith then brought his case to this court,

and sought to present questions under the Federal Constitution. This court dismissed the case because:

"It is evident the Auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of these duties was of no personal benefit to him. He neither gained or lost anything by invoking the advice of the Supreme Court as to the proper action he should take.

"We think the interest of an appellant in this court should be a personal and not an official interest, and that the defendant having sought the advice of the courts of his own State in his official capacity should be content to abide by their decisions."

And this rule was enforced against the Braxton County Court, officers of the State of West Virginia, although they asserted the action of the State complained of was in violation of Section 10, Article 1 of the Federal Constitution. This the court said "does not always give this court jurisdiction to review the judgment of the State court."

"The party raising the question of constitutionality, and invoking our jurisdiction must be interested in, and affected adversely by the decision of the State court sustaining the act, and the interest must be of a personal, and not of an official nature."

By the same token when the Supreme Court of Indiana advised the plaintiffs in error as State officers that the statute in question was void, they must remain content. It makes for good government that state officers must obey the command of the Supreme Court as to their duties under state laws. The Supreme Court held Chapter 118 was no law. As said in Smith v. Indiana *supra*, whether a statute, is a law, or no law "is a purely local question."

Besides, the bare averment of a federal question is not

enough. "There must be at least color of ground for such averment."

New Orleans v. N. O. Water Works Co., 142 U. S. 79, 87;
Hamblin v. Western Land Co., 147 U. S. 531, 532.

There is no color of ground for a State officer to say that a judgment of the Supreme Court of his State that a state statute is void under the Constitution of that State, violates Section 4, Article 4 of the Constitution of the United States.

We submit that the case should be dismissed for lack of jurisdiction.

NO FEDERAL QUESTION.

The defendant in error maintains that no federal question is presented upon the record.

First. No federal question was decided by the Supreme Court of Indiana.

Second. The plaintiffs in error did not attempt to set up any federal question until after the issues were made, the trial had, and the court had made and filed the special findings of fact and stated the conclusions of law thereon.

Third. The plaintiffs in error being state officers had no duties to perform under a void statute and so have no rights secured under the Federal Constitution to be violated.

Of these in the order named:

(1) The Supreme Court decided but one question, *viz*: It affirmed the first and second conclusions of law of the trial court that Chapter 118 "is invalid and void for lack of power vested in the 67th General Assembly of the State

of Indiana to prepare and submit the same to the electors of the State in the manner in which it is proposed therein", and because not prepared in accordance with the provisions of the present constitution of the State of Indiana but in violation thereof; and because in the exercise of legislative power as given to the said General Assembly in and under the Constitution of the State of Indiana the said Assembly had no power to frame and submit to the electors of the State of Indiana the said proposed new Constitution in the Special Findings set forth, and the said act is unconstitutional, null and void. At the threshold of the opinion the court stated the case in these words:

"The underlying question involved out of which all the others presented grow, is simply whether the act presented as Chapter 118 is a valid exercise of legislative power by the General Assembly." (Tr., p. 67.)

Then follows the opinion of the court showing a careful study of the Constitution and form of our State Government and holding and adjudicating: "that the act of March 4, 1911, known as Chapter 118, is in violation of the Constitution and void, and the judgment of the lower court is affirmed."

This being so there was no further question to be decided except whether the Marion Circuit Court had jurisdiction to entertain this case, and enjoin the Secretary of State, and the State Board of Election Commissioners from carrying this void law into execution. The trial court in the 5th and 6th conclusions of law held that it had. And these conclusions were effected by the decree of injunction, which the Supreme Court affirmed. This point was carefully considered by the court, and the cases decided in this court, in the courts of many States, and in Indiana as well examined at length. This part of the opin-

ion begins at the foot of page 95 of the Transcript and continues to the end of the discussion.

Near the close of the discussion (Tr., p. 112.) the court said:

"The power to control by mandamus and injunction the ministerial acts of officers in relation to elections under unconstitutional statutes has been declared by this Court, and Courts of other States, in apportionment cases."

Citing Parker v. State, 133 Ind. 178;
Brooks v. State, 162 Ind. 586 (citing many cases);
Fesler v. Brayton, 145 Ind. 71.

The court continues:

"Many of the decisions reviewed above establish the capacity of the appellee to sue in such a case as this, and with this view our own cases are in harmony."

Harney v. Indianapolis, etc., R. Co., 32 Ind. 248;
Board v. Markle, 46 Ind. 96;
English v. Smock, 34 Ind. 115;
Denney v. State, 144 Ind. 503;
Fesler v. Brayton, 145 Ind. 71;
Brooks v State, 162 Ind. 568;
Remster v. Sullivan, 36 Ind. App. 385;
Gemmer v. State, 163 Ind. 158;
Spencer v. Knight, 98 N. E. 342.

And in support of the proposition that a state officer may be enjoined, including State Boards and Commissions of which the Governor is *ex-officio* a member from enforcing an unconstitutional and void statute, the court followed many cases decided by this court among which are:

Garfield, Secy. of Interior, v. U. S. 211, U. S. 249, 261;
Ballenger, Secy. Interior, v. U. S. 216, U. S. 240;

Board of Liquidation v. McComb, 92 U. S. 531;
Pennoyer v. McConnaughy, 140 U. S. 1;
Noble v. Union River Logging Co., 147 U. S. 172;
Brown v. Trousdale, 138 U. S. 389;
Smyth v. Ames, 169 U. S. pp. 518-19;
Davis v. Gray, 16 Wall, 203, 210, 220.

It is enough to say that it is for the Courts of Indiana to construe and apply the State Constitution and State laws and determine whether the Marion Circuit Court erred; and the Supreme Court had jurisdiction of the question in this case. There is no clause in the Federal Constitution, and no statute of Congress that gives this court jurisdiction to try that question on appeal.

It has often been held that the Governor and other state officers may be enjoined from acting under a void law.

Mott v. Pa. R. R. Co., 30 Pa. 9 (Gov. and others);
Lynn v. Polk, 8 Lea, p. 152 (State officers);
Wells v. Bain, 75 Pa. 39 (Election Commissioners);
Woods' Appeal 75 Pa. 59;
Warfield v. Vandiver, 101 Md. 78 (Governor);
Livermore v. Waite, 102 Cal. 113 (Sec'y of State);
Holmberg v. Jones, State Aud., 7 Idaho 752;
Taylor v. Louisville & N. R. Co., 88 F. 350 (State Board);
Governor v. Nelson, 6 Ind. 496;
Baker, Governor, v. Kirk, 33 Ind. 517;
Gray, Governor, v. State, 72 Ind. 567.

It therefore appears on this record that it was not necessary to the judgment of the Supreme Court that the questions of law stated in the 3d and 4th conclusions of the trial court should be, nor were they, considered or decided directly or by implication.

(These questions were whether certain provisions of the Ordinance of 1787, the Act of Congress enabling the people of Indiana to form a State, and the State Ordinance accepting the provisions of such Enabling Act were a part of the law of Indiana.)

We mention the rule, in the minds of all, that where the State court in rendering judgment decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to support the judgment, this court will dismiss the writ of error.

Rutland R. Co. v. Central R. Co., 159 U. S. 630.

It is asserted by plaintiffs in error that the Supreme Court decided a federal question against them. This is not true. If it were it would avail nothing; for it is settled that where a State Supreme Court decides a federal question, and also bases its judgment on another independent ground broad enough to maintain the judgment, the writ of error will be dismissed.

Hammond v. Johnston, 142 U. S. 73, 78.

(2) The contention made on behalf of the plaintiffs in error as we understand it is: that there is conferred by Section 4, Article 4 of the Constitution of the United States upon the Legislature of Indiana plenary power at pleasure to frame and submit to the electors as often as that body wills proposed new constitutions, anything in the existing Constitution of the State to the contrary notwithstanding. And that, therefore, Chapter 148 is a valid law of the State of Indiana and that the plaintiffs in error have the federal right to enforce the law although the Supreme Court of the State of Indiana decides the act to be unconstitutional and invalid under the Constitution of the State.

This must be the contention, for in a cause coming from

a Supreme Court the jurisdiction is "limited to the specific instances of denials of Federal rights * * * specially set up in the State Court and denied by the rulings and judgment of that court."

Waters, Pierce Oil Co. v. Texas 212 U. S. p. 97.

We beg leave to submit, first, that this contention is not brought here within the meaning of Section 237 of the present act, being Section 709 Revised Statutes. The case must be put in the third class of cases made by that section; that is, upon this record it must appear that at the proper time and in a proper manner the plaintiffs in error especially set up some title, right, privilege or immunity under the Constitution of the United States exempting them from the jurisdiction and judgment. What right or privilege or immunity these plaintiffs in error had to exempt them from suit are not stated especially. To the bill of complaint they were content to file the general issue. On this they went to trial and took special findings. And it was not until the findings and conclusions had been made against them and filed by the trial court that any mention is made of the constitutional provision. And then that mention is made in these words found among many reasons given in the motions to arrest judgment, to wit: "6. For the reason that a judgment herein in accordance with the conclusions of law heretofore stated would be in contravention of Article 4 of the Constitution of the United States which guarantees to every State of the United States a republican form of government."

Is this specially setting up some federal right which these State officers have, rendering them immune from suit when about to engage in the enforcement of a State statute violative of the State Constitution?

To sustain this contention it seems to us that they must affirm that the statute while void under the Constitution of the State is valid under the Constitution of the United States. Can it be thought that the people of a State may not provide in their Constitution that the Legislature which they create thereunder shall not have power to frame for them and require them to vote on the adoption or rejection of changes and alterations proposed in their established form of State government except in a way marked out in their constitution?

And if the Legislature does do that very thing in violation of the Constitution can it be thought such a void legislative act is yet valid under the provision that the United States shall guarantee to every State a republican form of government?

And when the Legislature of 1911 undertook to frame and submit amendments and alterations in the form of our State government in another way and manner, than in the Constitution provided, and after the Supreme Court adjudicates the act to be no law, we venture to ask: What federal right, privilege or immunity of these plaintiffs in error or any one of them has been violated?

We find none specially mentioned in their brief. Have these plaintiffs in error any "right", any "privilege", or any "immunity" which excepts either the Secretary of State or the members of the board of election commissioners from obedience to the Supreme Court of the State?

In behalf of Thomas R. Marshall it is said that because he was Governor he had a right or privilege to enforce this void act and was immune from judicial control. To this the Supereme Court answered that while sitting as a member of the State Board of Election Commissioners he was not sitting as Governor, for his executive powers

are single to him alone; and when sitting with two other State officers to exercise a power jointly or by a majority he is not exercising the power vested in the Governor, because the other two against his will and protest might make the action of the board contrary to his will and judgment.

Moreover, he was not sued in his executive capacity as Governor but as a member of the board of three composing the State Board of Election Commissioners. In the Marion Circuit Court he appeared and joined with the others in the general issue. We take it if a Governor or other officer on being sued once waives his right or privilege or immunity of exemption from judicial authority he cannot thereafter, when beaten, be heard to say that the court had no jurisdiction. Besides, as appears by the cases cited upon p. 20, he may be sued if he is using an unconstitutional law to the injury of others; and especially in a matter not of discretion.

It appears upon the record that both the Marion Circuit Court and the Supreme Court held they had jurisdiction over the subject-matter, viz: whether Chapter 118 was a law; and that Mr. Dye had a right to enjoin the defendants from enforcing it. Can it be said that this judgment is violative of the clause in the Federal Constitution relied upon; that the United States shall guarantee to every State in this Union a republican form of government? Does the decision of the Supreme Court of Indiana destroy and overthrow the existing form of republican State government? It still stands as a State. And the last session of the Legislature on March 15, 1913 (Acts 1913, p. 812), enacted that an election should be had in November, 1914, whether the people wanted a constitutional convention to be called "to alter, revise or amend the Constitution of the State of Indiana, or formulate a new constitution if deemed advis-

able." As pointed out in the opinion of the Supreme Court (Tr., pp. 75-6), this is the method recognized in this and other States, enabling the people to alter their existing Constitutions. In addition to this method, in Article 16 *supra*, page 1, the people provided another method of making amendments to the existing constitution.

It has often been held that the mere averment of a federal question is not enough to give this court jurisdiction over the judgment of a State court. A bare averment of a federal question is not sufficient. There must be a real and not a fictitious federal question apparent upon the record in order to confer jurisdiction.

> Hamblin v. Western Land Co., 147 U. S. p. 532, and cases cited.

We submit that the attempt to raise a federal question as to the validity of the judgment of the Supreme Court of Indiana in this case under the claim that the court had no right to make the judgment because such judgment violates Art. 4, Sec. 4, of the Constitution of the United States is fictitious, without foundation, and therefore the case should be dismissed.

(3) Whether a Secretary of State, and members of a State Board or Commission can be sued and enjoined from enforcing a void act, is a matter of State jurisprudence. It is not a federal question in any sense.

This question is considered at length in the opinion (Tr., pp. 194 to 109.)

And it is pointed out that this court in *Pennoyer v. McConnaughty, 140 U. S. 1*, held injunction would lie against a State Board composed of the Governor, Secretary and Treasurer of State to prevent them acting under an unconstitutional act.

The Supreme Court of Indiana compelled by mandate action of a State Board composed of the Governor, Attorney-General, Secretary of State and Treasurer of State.

Gray, Governor, v. State, 72 Ind. 567.

And the Supreme Court in this case sustained the injunction because as said:

"An unconstitutional law gives no power and imposes no duty."

It is not necessary to repeat the many other citations in the opinion. It is enough to know that in Indiana a Secretary of State and members of State boards composed of the Governor and other State officers may be enjoined from enforcing an unconstitutional act.

Besides it cannot be thought that Section 4, Article 4 of the Federal Constitution has a thing to do with this question.

Neither has it aught to do with the question whether Mr. Dye, as an elector and taxpayer, had the right to sue for himself and the other electors and taxpayers to enjoin an election under an unconstitutional act.

Little need be said in response to the contentions of the plaintiffs in error that the people of the State of Indiana have the right to alter and reform their State government. That is not denied by any one. But of course it must be done by lawful means and methods. The plaintiffs in error could not of their own motion frame and submit a proposed new constitution. And as the act under which they were about to submit the same was unconstitutional, null and void under the existing Constitution of the State, that is just what they were about to do. When officers attempt to enforce an unconstitutional act concerning elec-

tions any elector has the right to arrest the action by injunction.

Brooks v. State, 162 Ind. 568, 576-7;
Parker v. State, 133 Ind. 178;
Fesler v. Brayton, 145 Ind. 71;
Remster v. Sullivan, 36 Ind. App. 385. Approved by the Supreme Court in this Case. (Tr., p. 113.)
Gemmer v. State, 163 Ind. 158;
Spencer v. Knight, 98 N. E. 342 (Ind.)

And so is the law in many other States.

State v. Wrightson, 56 N. J. Law 126;
State v. Cunningham, 81 Wis. 477, 83 Wis. 90;
State v. Van Duyn, 24 Neb. 586;
Conner v. Gray, 88 Miss. 489;
Woods, Appeal, 75 Pa. 59;
Warfield v. Vandiver, 101 Md. 78;
Livermore v. Waite, 102 Cal. 113;
Tolbert v. Long, 134 Ga. 292;
Wells v. Bain, 75 Pa. 39;
Carton v. Sec'y of State, 151 Mich. 337.

THE ORDINANCE OF 1787 AS ACCEPTED BY THE STATE OF INDIANA.

One of the grounds set forth by Mr. Dye in his bill was that the proposed new constitution was violative of the law of Indiana as made by the Ordinance of 1787, the act of Congress enabling the State government to be organized of date April 19, 1816, and Ordinance of the Constitutional Convention of the State made on June 29, 1816. In the second article of the Ordinance of 1787 it was declared "the inhabitants of said territory shall always be entitled to the benefit * * * of a proportionate representation of the people in the Legislature." In the 4th section of said Enabling Act it was provided that when the constitu-

tional convention was convened it "shall then form for the people of said territory a constitution and state government; provided that the same whenever formed shall be republican, and not repugnant to those articles of the Ordinance of the 13th of July, 1877, which are declared to be irrevocable between the original States and the people and States of the territory northwest of the River Ohio."

It was provided in the ordinance of the State Constitutional Convention that "we do for ourselves and our posterity agree, determine, declare and ordain that we will and do hereby accept the propositions of the Congress of the United States as made and contained in their act of 19th day of April, 1816, * * * and that this ordinance and every part thereof shall forever be and remain irrevocable and inviolate without the consent of the United States in Congress assembled first had and obtained for the alteration thereof or any part thereof." Indiana Ordinance, R. S. Ind. 1843 p. 36.

The existing constitution of Indiana declares that the number of senators and representatives in the State Legislature shall "be fixed by law and proportioned among the several counties according to the number of male inhabitants above 21 years of age in each." Art. 4, Sec. 5, 1 Burns, R. S. 1908, Sec. 101.

The "proposed new constitution" changed said section so as to provide that each county without regard to population should have one representative in the House and an additional representative if it appeared on dividing the total population of the State as shown by the last national census by the number of counties, to wit, 92, any county had a greater population than 1/92 part of the entire population of the State equal to a full quota and fractional surplus. (Tr., p. 23, sec. 4.)

In the special findings the court found that the population of the State as shown by the 13th census was 2,709,876. (Tr., foot page 45.) Dividing the same by the number of counties shows the quota mentioned to be about 30,000. Under any construction of the provision in the proposed constitution no county could have more than one representative without it had at least 45,000 population. A glance at the population of the counties as set forth in the special findings (Tr., p. 46,) shows that eight counties only had a population in excess of that number. It will further appear that Ohio county had a population of 4,329, Brown county, 7,975, Scott county, 8,328, Switzerland, 9,914, Union, 6,260. So that these small counties would have in the Legislature the same representation as the counties of Tippecanoe with a population of 40,063, Cass with a population of 36,368, Sullivan with a population of 32,439, and so on. The trial court held as matter of law as shown in the 3d and 4th conclusions (Tr., p. 51,) that the said provision in the proposed new constitution was violative of the fundamental law of Indiana in the matter of proportional representation.

In appellants' brief, page 74 *et seq.*, the plaintiffs in error seem to insist that the correctness of the ruling of the Circuit Court in the matter under consideration is presented for review here.

To this we answer, first, that this question was not specially set up in the trial court by demurrer, answer or in the motions to arrest, nor was it specially set up in any assignment of error in the Supreme Court. Besides counsel fail to observe that questions of this class can only be brought on writ of error when the decision is against their validity.

As this federal question was not set up by the defend-

ants in error in the State courts, it became immaterial to be considered by the Supreme Court after that court had held that Chapter 118 was in violation of the existing constitution of the State, and void. But it is perhaps not improper to state, that the courts, federal and state, sitting in Indiana have held the ordinance of 1787 is the law of the State.

Cox v. State, 3 Blackf. 194 (1833). Approved in Williams v. Beardsley, 2 Ind. 596 (1851); Jolly v. Terre Haute Bridge Co., 6 Mclean 237.

The federal and State courts sitting in the other States carved out of the Northwestern territory have held the same:

Spooner v. McConnell, 1 McLean 337;
Vaughan v. Williams, 3 McLean 530;
Palmer v. Cuyhoga Co., 3 McLean 226;
Hogg v. Zanesville, etc., Co., 5 Ohio 416;
Hutchinson v. Thompson, 9 Ohio 52, 62;
Cochran's Heirs' Lessee v. Loring, 17 Ohio, 409, 424-5;
State v. Boone, 95 N. E. 924 (Ohio);
Giddings v. Blacker, 52 N. W. 946 (foot) Mich;
Pheebe v. Jay, 1 Breese 268 (Ill.);
Connecticut Ins. Co. v. Cross, 18 Wis. 109;
Milwaukee, etc., v. Schooner Gamecock, etc., 23 Wis. 144;
Wisconsin, etc., v. Lyons, 30 Wis. 61;
Attorney-General v. Eau Claire, 37 Wis. 400;
State v. Cunningham, 51 N. W. 724, 729 (Wis.).

Whether the said provisions of the ordinance of 1787 are a part of the law of Indiana turns perhaps on the force and effect of the Ordinance of the Constitutional Convention made at Corydon on June 29, 1816.

Ind. R. S. 1843 p. 36.

And this we understand to be a question of State law only.

Cincinnati v. Railroad Co., 233 U. S. p. 401

At most, it was not decided, or necessary to be decided by the Supreme Court of Indiana.

The defendant in error asks that the case be dismissed.

ADDISON C. HARRIS,
Attorney for defendant in error

September 18, 1913.